Class Arbitration in the European Union

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Maklu
Antwerpen | Apeldoorn | Portland

Philippe Billiet (ed.)
& Association for International Arbitration (AIA) (co-editor)
Class Arbitration in the European Union
Antwerpen-Apeldoorn-Portland
Maklu
2013

242 pag. – 24 x 16 cm
ISBN 978-90-466-0490-8
D/2013/1997/10
NUR 828

Maklu
Somersstraat 13/15, 2018 Antwerpen, Belgium, info@maklu.be
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Introduction

Philippe Billiet

Since recent years, at least 14 EU Member States provide for a form of collective redress and several other EU Member States consider doing the same.

The ways in which these EU Member States provide or intend to provide collective redress varies in form and conditions. The main forms through which collective redress is offered are: 1) grouped actions, 2) class actions and 3) actions initiated by (non-representing) collective interest actions.

The distinction between these main forms of collective redress is crucial to determine who the parties to the procedure are:

- In a *grouped action*, several legal entities are brought together; each of them to become a separate party to the procedures (e.g. joined claims). Every member of the group is party to the procedure. A default ruling may be rendered against those parties which have not appeared in court.

- In a *class action*, all members of a class are to be regarded as an (indirect) party to the dispute, regardless of whether they actively participate in the procedure. To determine who are members of a class, class action rules provide for either an opt-in or an opt-out system. In an opt-in system only one who has actively chosen to become a member of the class will be considered a member. In an opt-out system everyone falling under the class category and who did not actively opt-out will be considered a member of the class. When this representative action takes place in the ADR forum (e.g. class arbitration and class mediation) the opt-out formula may create an exception or at least a modulation to the commonly accepted consensus-principle. The consensus-principle provides that ADR is an alternative to litigation and should therefore be based on consent between the parties. In class actions, the class, i.e. the members belonging to the class, will be represented by a class representative.

- In a *collective interest action*, a legal entity defends a collective interest and only this entity should be regarded as a party to the proceedings.

Correct identification of the parties to a dispute is of major importance. For instance, if a class 'loses' in a class action procedure, every member of the class will in

principle be undergoing *res judicata* effects. On the other hand, if the class won the procedure, every member will in principle be entitled to request execution of the ruling. In a collective interest action it will only be the legal entity which represents the collective interest that loses the procedure, meaning that the individual members to such entity would in principle not be bound by the ruling.

This book will focus on **class arbitration**, which is a class action taking place in the arbitration forum.

Class arbitration in the US exists already since over twenty-five years[1] and has, in the absence of proper regulation, essentially been given its shape through case law and practices.

The number of US class arbitration cases is expanding at a rapid rate.[2] This is especially the case after leading arbitration institutions such as AAA (the American Arbitration Association) and JAMS decided to provide specific rules on class arbitration, which proved to be a necessary step to encourage the use of class arbitration.[3] To give an idea, since 2007 the AAA has administered over 120 class arbitrations.[4]

Under the US class action system, the assessment as to whether an action can be arbitrated through a class is to be made by the arbitrator.[5] In his assessment the arbitrator distinguishes between (i) situations where an arbitration agreement exists explicitly authorizing class arbitration, (ii) situations where an arbitration agreement exists that prohibits class treatment and (iii) situations where an arbitration agreement exists that is silent on the point of class arbitration:

- *Existence of an arbitration agreement explicitly authorizing class arbitration:*

  If an arbitration agreement explicitly authorizes class arbitration, such agreement should in principle be respected. Indeed, the consensual nature of arbitration urges to enforce the agreement in accordance with its terms insofar as the law allows to do so.

  In practice however, these agreements rarely exist, as arbitration provisions tend to be used by companies for other purposes, i.e. in their attempts to avoid class treatment by compelling for individual arbitration.

1 *See:* Keating v. Superior Ct., 645 P.2d 1192, 1209–10 (Cal. 1982), *rev'd on other grounds sub nom.,* Southland Corp. v. Keating, 465 U.S. 1 (1984) (constituting one of the first class arbitration cases in the United States).

2 *See:* http://www.adr.org/sp.asp?id=25562.

3 *See* the extended AAA's class arbitration case docket on: http://www.adr.org/sp.asp?id=25562.

4 W. Mark C. Xeidemaier, *Arbitration and the Individuation Critique,* 49 Ariz. L. Rev. 69, 70 (2007).

5 *See: Green Tree Fin. Corp. v. Bazzle,* No. 02-634, decision of June 23, 2003; *Redman Home Builders Co v. Lewis* Case, No. 2:07 –cv)107 WL 1559932 (S.D. Ale. May 29, 2007); *Fastfunding the Company v. Betts,* 951 So. 2d 116 (Fla. 5th DCA March 16, 2007).

- *Existence of an arbitration agreement that prohibits class treatment:*

  US companies have often used and continue to use arbitration provisions that require individual arbitration as a tool to avoid class treatment.

  In the past, most courts used to enforce these class-treatment waivers, guided by the strong pro-arbitration policy of the Federal Arbitration Act. Yet since recent years evolutions have taken place in US case law, leading to a practice in which class treatment may be excluded unless the arbitration clause that compels for individual arbitration; 1) violates public policy, 2) contravenes the terms, legislative history or purpose of a specific statute or 3) creates (material/procedural) unconscionability.[6]

  Even so, in the AT&T Mobility case[7], a recent (2011) major landmark decision, the United States Supreme Court decided that arbitration agreements in standard form consumer contracts which prohibit class treatment are enforceable.

  In this case, AT&T compelled for individual arbitration. The Concepcions (counterparty) opposed, arguing that the arbitration agreement, which allowed only for

6 *See: Dale v. Comcast Corp*, F. 3rd, 2007 WL 2471222 (11th Cir. Sept. 4, 2007; *Alabama Supreme Court case, Leonard v. Terminex Int`l Co.*, 854 So. 2d 529 (Ala. 2002); *Gatton v. T-Mobile USA Inc* 152 Cal. App. 4th 571 (Cal. App. 2007); *Discover Bank v. Superior Court,* 113 P. 3d 1100 (Cal 2005); *Scott v. Cingular Wireless*, P. 3d, 2007 WL 2003404 (Wash. July 12, 2007); *Caban v. J.P. Morgan Chase & Co* 2009 WL 890392 (S.D. Fla. Mar. 23, 2009); *Homa v. American Express Co* F. Supp. 2007 WL 1585168 (D.N.J. May 31, 2007); *Jenkins v. First Am. Cash Advance of GA, LLC*, 400 F.3d 868 (11th Cir. 2005); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005); *Omstead v. Dell, Inc.*, 473 F. Supp. 2d 1018 (N.D. Cal. 2007); *Livingston v. Asters Pin, Inc.*, 339 F.3d 553, 558 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin Corp-Ala.*, 244 F.3d 814, 818–19 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266 (D. Ariz. 2007); Rollins, Inc. v. Garrett, 176 Fed. Appx. 968, 968 (11th Cir. 2006); *Muhummad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Kristian v. Comcast Corp.*, 446 F.3d 25, 53–61 (1st Cir. 2006); *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied,* 537 U.S. 1226 (2003); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002); *Gentry v. Superior Court*, 64 Cal. Rptr. 3d 773 (Cal. Ct. App. 2007); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344 (Cal. Ct. App. 2007); In *re Cingular Cases*, No. D047608, 2007 WL 93229 (Cal. Ct. App. Jan. 16, 2007); *Firchow v. Citibank* (South Dakota), N.A., No. B187081, 2007 WL 64763 (Cal. Ct. App. Jan. 10, 2007); *Mandel v. Household Bank* (Nevada), 129 Cal. Rptr. 2d 380 (Cal. Ct. App. 2003); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267 (Cal. Ct. App. 2003); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002), *cert. denied,* 537 U.S. 1226 (2003); *Betts v. McKenzie Check Advance of Fla.*, Case No. CL 01-320 AI (Fla. Cir. Ct. 2008); *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820 (Ill. App. Ct. 2005); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313–14 (Mo. Ct. App. 2005); *Muhummad v. County Bank of Rehobeth Beach*, 912 A.2d 88 (N.J. 2006); *Tillman v. Commercial Credit Fla. Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio Ct. App. 2004); *Vasquez-Lopez v. Beneficial Or., Inc.*, 152 P.3d 940 (Or. Ct. App. 2007); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006); *Lytle v. Citifinancial Services*, Inc., 810 A.2d 643 (Pa. Super. Ct. 2002); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007); *W. Va. ex rel Dunlap v. Berger*, 567 S.E.2d 265, 278–79 (W. Va. 2002), *cert. denied,* 527 U.S. 1087 (2002); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 745 (Wis. Ct. App. 2007); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155 (Wis. 2006).

7 *AT&T Mobility LLC v. Concepcion,* 563 US (2011), decision of April 27, 2011.

individual proceedings, was unconscionable under California law, specifically under the Discover Bank rule. The Discover Bank rule – established in Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005) – provides that an arbitration agreement found in a consumer contract of adhesion which excludes any class treatment, is unconscionable and therefore unenforceable. The rule only applies to adhesion contracts, but almost all consumer contracts in the United States are of that kind. AT&T reacted that this unconscionability finding is preempted by the FAA.

The Supreme Court followed AT&T's reasoning in finding that the Discover Bank rule was an impediment to the fulfillment of the purposes and objectives of arbitration and the FAA. The purpose of arbitration is to resolve problems through a quicker, less formal and less expensive procedure. The Court mentioned that according to the AAA, the average bilateral arbitration opened by the AAA lasted 4-6 months and that none of the 283 class arbitrations opened by the AAA would have resulted in a final award on the merits. 162 would have been settled, withdrawn, or dismissed after a mean of 630 days. According to the Court, these statistics would illustrate that class arbitrations frustrate the efficiency that the arbitration procedure can, and is meant to offer.

The Court gave three main reasons for its ruling in AT&T, the first being that the advantage of arbitration lies in its informality, whereas class arbitration requires heightened procedural formalities that come with the certification of the class and with discovery issues that would arise. Secondly, class arbitration would be more expensive, and the added parties would complicate and slow down the arbitration process. Finally, class arbitration would increase the risk to defendants due to the absence of multilayered review in arbitration, which increases the chance of uncorrected errors.

Justice Breyer argued in his dissenting opinion that the FAA did not preempt state contract law, and that California is free to define unconscionability as it sees fit. The dissent also noted that with the unavailability of a class proceeding, the alternative will not be millions of individual suits, but zero individual suits.

Since the AT&T ruling, it is likely that corporations that have in the past chosen to abstain from using arbitration will now compel to individual arbitration in their contracts and by doing so may succeed in avoiding class action.[8]

- *An arbitration agreement is silent on the use of class arbitration:*

Before the US Supreme Court issued the landmark decisions that will be addressed under this title, US courts were heavily divided regarding whether

[8] S. Marcus and M. Ladd, "*AT Mobility V. Concepcion*" (2011), AIA, *In Touch* (Newsletter July 2011), p. 4 – http://www.arbitration-adr.org/documents/?i=198.

arbitration agreements silent on the use of class arbitration allow class treatment in the arbitration forum. Judges were divided between those that were not in favor of arbitration (the "Naysayers") [9]and those that were (the "Proponents")[10].

In the 2003 *Green Tree* decision[11], the US Supreme Court reviewed a decision of the Supreme Court of South Carolina, which had to examine "*whether class-wide arbitration is pe*rmissible, when the arbitration agreement between the parties is silent regarding class actions". There was no specific reference to class arbitration. The Supreme Court of South Carolina held that such arbitration agreement was ambiguous and therefore interpreted its wording as permitting class arbitration.

The defendant appealed to the US Supreme Court, raising the question as to whether an arbitration clause under the Federal Arbitration Act (being the law governing the arbitration agreement), which did not clearly provide for class arbitration, could be interpreted as an acceptance of class arbitration. The majority opinion in this case concluded that an arbitration agreement provides broad powers to the arbitral tribunal and leaves the clauses' interpretation to arbitrators. Subsequently, the United States Supreme Court remanded the case to the arbitrator to decide the arbitration clause's meaning, i.e. whether an arbitration clause that was silent on the issue of class arbitration availability did or did not allow class arbitration as a means of dispute resolution. This finding is in fact an application of the internationally accepted principle of the arbitrators competence-competence, following which an arbitrator is competent to rule on his own competence.

A second landmark decision was rendered in the 2010 *Stolt-Nielsen* case.[12] In this case, the Supreme Court ruled that "*the Federal Arbitration Act imposes certain rules of fundamental importance, including the basic concept that arbitration is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they may see fit. Just as they may limit by contract the issues which they will arbitrate so too may they specify by contract the rules under which that arbitration will be concluded.*" Consequently, an arbitration agreement silent on class arbitration was not being interpreted as allowing for class arbitration. In other words, silence does not amount to the required consent for class arbitration.

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9 Examples: *Champ v. Siegel Trading* Co, 55 F. 3d 269 (7th Cir. 1995); *Glencore, Ltd. v. Schnitzer Steel Products Co.*, 189 F.3d 264 (2d Cir. 1999); *Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71-74 (2d Cir. 1993); *American Centennial Ins. Co. v. National Casualty Co.*, 951 F.2d 107 (6th Cir. 1991); *Baesler v. Continental Grain Co.*, 900 F.2d 1193 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir. 1989) (per curiam); *Del E. Webb Construction v. Richardson Hospital Authority*, 823 F.2d 145, 150 (5th Cir. 1987); *Weyerhaeuser Co. v. Western Seas Shipping Co.*, 743 F.2d 635 (9th Cir. 1984); *Med Center Cars, Inc v. Smith Trading,* 727 SO.2d9 (Ala. Sup. 1998).

10 Examples: *Connecticut General Life Insurance Co. v. Sun Life Assurance Co. of Canada a.o,* 2010 F. 3d 771, NOS.99-4085, 99-4106 (7th Cir. 2000); *Dickler v. Shearson Lehman Hutton Inc,* 596 A. 2d 860 (Pa. Super. 1991).

11 *Green Tree Fin. Corp. v. Bazzle,* No. 02-634, decision of June 23, 2003.

12 *Stolt-Nielsen S.A., et al v. Animal Feeds International Corp,* No. 08-1198, decision of April 27, 2010.

Only a few weeks after the referred *Green Tree decision*, the AAA issued a dedicated policy and developed Supplementary Rules on class arbitration. This was done mainly to address the fact that, since this case, it was established that the arbitrator, and not the court, must decide whether class relief is permitted.

Subsequently, the AAA administers demands for class arbitration if: 1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and 2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

The AAA, in its procedural rules[13], is currently not accepting administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless a court order directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the AAA.[14]

JAMS, a second major US arbitration center, also responded to the *Green Tree* landmark decision by developing its policy and rules for class arbitration. These rules are known as the JAMS Class Arbitration Procedures.

Under the AAA and JAMS rules, class arbitrations proceed roughly in the following 3 stages:

1) *Construction of the arbitration clause:* In the clause construction stage, the arbitrator shall determine (as a threshold matter) whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.[15]

2) *Class certification:* Subsequently, in the Class Certification stage, the arbitrator is guided to allow the class certification only where the arbitral clause was deemed to allow class arbitrations or where a court has ordered that class arbitration may be maintained.[16]

13 *See:* American Arbitration Association Policy on Class Arbitrations (July 14, 2005), http://www.adr.org/Classarbitrationpolicy.

14 In a recent review of this practice by the Association's Executive Committee it was agreed that this practice should be maintained in light of the continued unsettled state of the law.

15 Once the arbitrator decides whether the arbitration should proceed as a class, he issues the class determination award, which is a reasoned partial award. If class arbitration is to proceed, this award shall define the class, identify the class representative(s) and counsel, describe the mode of delivery to class members, describe when and how members of the class may be excluded and shall set forth the class claims, issues, or defenses.

16 JAMS class certification requires satisfaction of rules that, like the AAA's Rules, are based on Rule 23 of the Federal Rules of Civil Procedure.

3) *Final Award:* If the case remains alive after this stage, the arbitrator(s) shall issue a final award on the merits, which shall be reasoned and shall define the class with specificity.

The main difference between the AAA rules and the JAMS rules is that under the JAMS rules there is no requirement that any interim awards be issued, nor is there an explicit period for court review or an obligation to publicly register the awards. Important is also to note that (at least) under the AAA rules any failure to object to an interim stage could be construed by an enforcing court as a waiver of that particular objection under the New York Convention (see chapter VI) after the completion of proceedings. The AAA Supplementary Rules thus minimize expenditures of time, money and effort, both for legitimate end illegitimate objections to enforcement, while the JAMS model is closer related to a type of court-free system.

Ongoing debate exists regarding the question whether or not class actions are better dealt with in the litigation forum or in the arbitration forum. It should be noted that facts illustrate that numerous requests for class arbitration (at least for institutional arbitration before AAA and JAMS) are filed, that an increasing number of class arbitrations take place and that most (almost all) class arbitration procedures end with a settlement agreement.[17]

Much criticism has been focused on this latter point, i.e. that many class arbitrations tend to end in a settlement. Some opine that this fact would illustrate that class arbitration as such is an inefficient system to deal with mass disputes. This position was also taken in the aforementioned *AT&T mobility case*.

This argument is however not at all convincing, as the large number of settlements in US class arbitrations should not *per se* be considered as an indicator of a 'failing dispute resolution system' but may, to the contrary, demonstrate that the forum of arbitration, more so than the forum of litigation, enables and facilitates parties to settle alongside the procedure.

Indeed, the ever increasing number of requests for US class arbitrations before AAA and JAMS demonstrates the market's willingness to take recourse to (administered) class arbitration – as opposed to class litigation – and may also demonstrate the parties' initial or discovered will to settle along the way privately. It may indeed be that ordinary judges are less capable or less focused on helping parties find an amiable solution to their case.[18] Moreover, as many arbitrators tend to also have developed experience as mediator, such arbitrator is likely better placed than a judge to help parties find a solution to the matter, based on an interest-driven approach.

17 *See:* http://www.adr.org/sp.asp?id=25562.

18 Moreover, also many certified class actions are settled. So the fact that most class arbitrations end with a settlement cannot be used as an argument that class arbitration is an inferior mechanism to resolve mass disputes compared to class actions.

When comparing class arbitration to class litigation, an increasing number of authors tend to agree that "*the disadvantages of judicial class actions do not track class arbitration quite so closely, due to the privatized nature of arbitration. For example, the courts are not clogged by large cases, since arbitrators work independently, nor are there choice of forum or jury issues, since the parties have chosen arbitration precisely to avoid such concerns. The only real concerns involve ethical issues; pressure to settle; and, most importantly, due process issues. Thus class arbitrations would seem at least as socially beneficial, and possibly more so, than class actions*".[19]

Subsequently, one can in fact detect an evolution from a pro-litigation approach towards a pro-arbitration (and pro-mediation) approach regarding the settlement of class actions. This shift is in essence based on international commercial arbitration offering the possibility for more active adjudication than litigation. In other words, the need for a hands-on arbitrator in a class proceeding can more easily be fulfilled and is not problematic as a matter of practice and theory. [20]

Besides this, class actions are more likely to have an international dimension as compared to ordinary disputes and it must be understood that parties therefore prefer international arbitration over litigation, as this forum offers better enforcement mechanisms. In particular does this choice also avoid biases of national courts and procedural quirks that might give one party a home court advantage.

The possibility for class arbitration may even serve the economic interests of a country. Indeed, research suggests that countries have an economic interest in supporting class arbitration, as "*the more a country wants to become active in international commerce, the more likely it is that the courts and/or legislature of that country will adopt a pro-arbitration stance, since the inability to obtain reliable enforcement of an arbitral award typically leads international commercial actors to avoid business dealings with entities based in that state*".[21] This is a particular reason why countries may promote the use of the arbitration forum to deal with class actions.

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19 Strong, S.I., Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611, p. 17.

20 *See:* Alan Scott Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 91-92, 97 (1995) (stating that international arbitrators play a more active role in directing the proceedings than common law judges).

21 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. See also: Christopher R. Drahozal, *Regulatory Competition and the Location of International Arbitration Proceedings*, 24 INT'L REV. L. & ECON. 371, 372–74 (2004) (arguing that the number of arbitrations in a given country increase upon the enactment of a new or revised arbitration law).

Nevertheless, critics of class arbitration may maintain a number of arguments, be it that their underlying concerns can be addressed by a proper tailored arbitration process and by proper training for class arbitrators;

- Firstly, since dealing with mass disputes demands certain skills and expertise from adjudicators dealing with such disputes, there may be some ground in the criticism with regard to the lack of experience of some arbitrators to deal with complex matters.[22] However, this is something that can be addressed by providing proper class arbitration training, requiring class arbitrators to meet certain criteria or to obtain certain qualifications.[23]

- Secondly, some may favor class litigation over class arbitration in noting that arbitrators do not have the same kind of network that judges do and may therefore be restricted (due to confidentiality concerns)[24] from "*discussing the issues with other experienced arbitrators or from using objectors to provide additional information to the court, either through written submissions or through attendance at a class settlement fairness hearing*".[25] For instance, U.S. courts handling class actions often work in tandem with other government actors, either on the regulatory side or when coordinating class actions that are proceeding in different *fora*, something which may be difficult in arbitration.[26] These concerns can however also be addressed, e.g. through tailored provisions in institutional rules for arbitration and/or arbitration agreements allowing *amicus curiae* briefs and/or third parties attendance to hearings and/or through the creation of professional network platforms of/ for class arbitrators...

- A third concern refers to the fact that any determinations made in arbitration are "*not intended to serve the public interest, but only that of the parties who have*

22 N. van den Berg, R. Henkemans, A. Timmer, (2007) *MASSACLAIMS, class actions op z'n Nederlands*, Ars Aequi Libri, Nijmegen 2007, p. 153.

23 For an example of tailored training, see www.emtpj.eu. The EMTPJ project offers tailored training standards for commercial cross-border mediators, enabling them to be considered accredited mediators in several jurisdictions.

24 *See:* Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corporation v. United States, 21 ARB. INT'L 211, 211– 212 (2005); Andrew Tweeddale, *Confidentiality in Arbitration and the Public Interest Exception*, 21 ARB. INT'L 59, 59–60 (2005); L. Yves Fortier, *The Occasionally Unwarranted Assumption of Confidentiality*, 15 ARB. INT'L 131, 131, 139 (1999) (describing instances wherein principle of confidentiality may be breached); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1273 (2006) (noting state and federal law fails to respect confidentiality in arbitration, at least in instances involving discovery or admissibility of evidence at trial).

25 *See:* Loukas A. Mistelis, *Confidentiality and Third Party Participation:* UPS v. Canada *and* Methanex Corporation v. United States, 21 ARB. INT'L 211, p. 218 (2005) (noting the practice of amicus filings has no counterpart in commercial arbitration).

26 Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges 2 (2005), 25-28 (describing the role of government actors in US class action litigations).

paid for the arbitration".[27] This is often found to conflict with the espoused public interest aspects of judicial class actions.[28] This concern may however have a rather theoretic character, as in practice, arbitrators do take in account fairness of the arbitral process and endeavor to render enforceable awards by respecting principles of due process and public policy.

- Critics further also focus on the need for court intervention (considering this as a condition to render the class arbitration procedure legitimate), the consensual nature of arbitration and the alleged impossibility for all parties to have a say in the appointment of the arbitrator.[29] These concerns can however be addressed, as will be demonstrated below, discussing the recognition and enforcement of class arbitration awards.

In conclusion, there are no compelling grounds why class arbitration would be less suited as compared to class litigation. Instead, based on the more interactive and liberal nature of arbitration, an increasing number of authors and commentators find arbitration a more suitable forum for class treatment than litigation.

In light of the above, this book aims to investigate to what extent class arbitration may take place in Europe and to what extent US class arbitral awards are enforceable in Europe.

This book should enable EU ADR providers to identify to what extent they may adopt own class arbitration rules and should serve as a guidance for EU arbitration practitioners dealing with class arbitration.

Furthermore and in line with evolutions in commercial cross-border mediation[30], this book should help to set out internationally recognized and accepted training standards for arbitrators dealing with class arbitration.

Last but not least, this book should help the arbitration community to finally develop a common perspective on class arbitration and should encourage the EU Legislator to acknowledge the advantages of class arbitration when developing a collective redress policy.

27 Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1958 (1996).

28 Jack B. Weinstein, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT'L L. 165, 172-74 (2001).

29 N. van den Berg, R. Henkemans, A. Timmer, (2007) *MASSACLAIMS, class actions op z'n Nederlands*, Ars Aequi Libri, Nijmegen 2007, p. 153.

30 *See* www.emtpj.eu.

General Reflections on the Recognition and Enforcement of Foreign Class Arbitral Awards in Europe

Philippe Billiet & Laura Lozano

1. Introduction

The Vice President of the European Commission and Commissioner for Justice, Viviane Reding, has publicly manifested against group actions in September 2012.

Indeed, Ms Reding stated at the German Jurist Forum, that the European Union was still too diverse to venture into a group action experiment. Besides that, she stressed that in light of the impressive protection for consumers already in place, she personally does not see benefits of importing US class actions into the European legal framework.

Nevertheless, regardless of whether class actions (and class arbitrations) can take place in Europe, this chapter will demonstrate that, under the provisions of the New York Convention, international commercial class arbitral awards should in principle be enforceable in Europe.

International class arbitrations are class arbitrations that give rise to arbitral awards that are made in the territory of another state than the state where the recognition and enforcement of such awards are sought.[31]

2. The New York Convention

The New York Convention[32] is a globally-enforceable treaty that sets out conditions regarding the recognition and enforcement of foreign commercial arbitral awards.

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31 International class arbitrations have also been defined as class arbitrations giving rise to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought. See, for instance; Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

32 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "New York Arbitration Convention" or the "New York Convention," is one of the key instruments in international arbitration. The New York Convention applies to the *recognition and enforcement of foreign arbitral awards* and the *referral by a court to arbitration*.

Article V of the New York Convention offers protection against abusive international arbitral procedures by constituting exhaustive means to challenge the execution of an award.

The main grounds under the New York Convention under which the enforceability of a class arbitral award is to be assessed refer to **(1) due process** (Article V(1)(b)) and **(2) public policy** (Article V(2)(b)) concerns. Whereas the bases for objection found in article V(1)(b) may be raised by the parties, the bases for objection in article V(2)(b) may be raised by the parties or by the court *ex officio*.[33]

For both grounds it must be noted that "*grounds for refusal of enforcement must be construed narrowly; they are exceptions to the general rule that foreign awards must be recognized and enforced*" "[34] and that "*none of the existing objections to enforcement can be interpreted in such a way as to allow opponents to international class arbitration to overcome the New York Convention's presumption in favor of enforcement*"[35].

3. Common Law vs Civil Law traditions

International arbitration must however be assessed against the background of states taking different perspectives towards due process and public policy. For instance, as opposed to several common law jurisdictions, civil law jurisdictions tend to emphasize the individual nature of legal claims, a notion that may in these jurisdictions often be considered as violated by a representative mechanism that disposes of the rights of absent class members.[36]

Different perspectives towards due process and public policy are indeed the main reason why some foreign courts routinely refuse to enforce US rulings, particularly those arising from class actions.[37]

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33 *See:* Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 10 (2007).

34 *See:* Alan Redfern & Martin Hunter, Law And Practice of International Commercial Arbitration paras. 10-33 to 10 34 (4th ed. 2004) (noting that the grounds for objections to enforcement set out in article V of the New York Convention are "exhaustive") and Julian D.M. Lew *et al.*, Comparative International Commercial Arbitration para. 26-66 (2003).

35 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. (p. 55)

36 Civil law nation may indeed interpret a class action – even with an opt-out provision – as an infringement of a non-representative plaintiff's right to decide when and how to exercise his or her right to a cause of action.

37 *See:* Ilana T. Buschkin, Note, *The Viability of Class Action Lawsuits in a Globalized Economy–Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1566 (2005); Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 6-7 (2002) (discussing Italian courts' close scrutiny of American class action judgments); Michele Taruffo, *Some Re-*

For instance, in *Bersch v. Firestone Inc*, practitioners from five European nations went on record with affidavits, stating that the courts of their countries would not enforce a judgment in a class action suit.[38]

Unlike common law countries, (which often permit representative actions, albeit to varying degrees), civil law jurisdictions tend to limit or prohibit such actions based on the ideas that: 1) plaintiffs have the right to choose the time and manner of bringing a cause of action, and 2) defendants have the right to mount a full, individualized defense of all legal and factual claims brought against them.[39] Representative actions both in court and in arbitration would jeopardize these principles.

For instance, under civil law jurisprudence, absent class members are not always considered to be effectively choosing to exercise their right to a cause of action, even if they can opt out of the proceedings. In the same way, defendants are considered unable to defend themselves adequately against the generalized claims of absent class members.[40]

Civil law traditions may also view arbitration as a contractual construct and argue that if the parties to the arbitration do not explicitly agree to class treatment, it is improper to proceed as such.[41]

Nevertheless, in light of a pro-arbitration stance, the existing concerns about public policy and due process do not overcome the pro enforcement presumption[42] of the New York Convention.

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marks on Group Litigation in Comparative Perspective, 11 DUKE J. COMP. & INT'L L. 405, 415–17 (2001) (outlining grounds for European resistance to American-style class actions).

38 519 F.2d 974, 996–97 (2d Cir. 1975) (admitting affidavits from practitioners from the United Kingdom, the Federal Republic of Germany, Switzerland, Italy, and France stating that courts in those jurisdictions would not enforce judgments resulting from American class actions).

39 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. (p. 9)

40 *See:* Richard H. Dreyfuss, *Class Action Judgment Enforcement in Italy: Procedural "Due Process" Requirements*, 10 TUL. J. INT'L & COMP. L. 5, 14 (2002) (discussing Italian courts' close scrutiny of American class action judgments) and Michele Taruffo, *Some Remarks on Group Litigation in Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 415–17 (2001) (outlining grounds for European resistance to American-style class actions).

41 *See:* W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L. J. 1, 8 (1995) (stating "[d]esigned as a system of private justice, arbitration is a creation of contract"); Thomas J. Stipanowich, *Arbitration and the Multiparty Dispute: The Search for Workable Solutions*, 72 IOWA L. REV. 473, 476 (1987) (noting "arbitration is ... a creature of contract").

42 Indeed, there is such presumption. Much of the operative language is in mandatory terms: article II states "[e]ach Contracting State shall recognize an agreement in writing" to arbitrate, while article III states "each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." Language permitting deviations from the general pro-enforcement stance is couched in permissive, rather than mandatory, terms. Therefore, although "recognition and enforcement of the

Indeed, the authors agree with leading commentators in finding that "*class arbitrations should be treated at the enforcement stage [in] the same way as awards resulting from bilateral arbitrations, with no special blanket objections being permitted as a result of the special nature of class arbitration*".[43]

The authors further also concur with the finding that "*even states that oppose representative actions in their courts should still enforce class awards because arbitration is a mechanism that welcomes flexibility, informality and innovation*"[44] and that, to this end in an arbitration, "*absent class members may be considered as affirmatively having chosen to exercise their individual rights at this time and in this manner*".[45]

4. Due Process concerns

Due process in the context of the New York Convention is difficult to define and what constitutes due process is not uniform across all the contracting states.[46] At a minimum, due process requires "*that parties be provided with (1) reasonable notice and (2) an opportunity to be heard*".[47]

award may be refused" on the request of a party, such refusal is permitted only on five specific grounds, even assuming that the court is so inclined.

43 *See*, for instance, Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. See also: Julian D.M. Lew *et al.,* Comparative International Commercial Arbitration para. 16-1 (2003) ("There is a general tendency to presume that arbitration involves only two parties.")

44 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. P. 64.

45 This choice follows the initial agreement to arbitrate, as that agreement can be construed to bind the signatories to whatever procedure the arbitrator deems proper in his or her discretion, subject only to the parties' explicit instructions and the application of relevant arbitration rules or through absent class members' failure to opt out of proceedings.

46 Judith O'Hare, *The Denial of Due Process and the Enforceability of CIETAC Awards Under the New York Convention: the Hong Kong Experience*, 13 J. INT'L ARB. 179, 184 (1996) (discussing the waiver of due process rights in Hong Kong); Troy L. Harris, *The "Public Policy" Exception to Enforcement of International Arbitration Awards Under the New York Convention: With Particular Reference to Construction Disputes*, 24 J. INT'L ARB. 9, 11, 16 (2007) (noting that public policy arguments can vary depending on the basic notions of morality and justice in forum states); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1321–1322 (2003) (noting the harmonization of due process "across national arbitration regimes").

47 *See* Article V(1)(b) of the New York Convention. See also Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 WM. & MARY L. REV. 1770 (2005–2006) and *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (stating that notice reasonably calculated to inform parties of pendency of action is fundamental to due process).

The notice-requirement refers to the content, magnitude and efficacy of the notice.[48] Different jurisdictions take different approaches to the notice-requirement for representative actions.[49] For instance, Civil law countries are likely to require an actual notice to class members instead of a 'reasonable' notice. Besides this, notice may also be required at different times, e.g. prior to class certification and settlement.

The notice-requirement must be assessed under the law of the arbitral forum or the procedural law of the arbitration, possibly supplemented by institutional rules.[50] Therefore, the seat of the arbitration will likely play a role in the presumptive enforceability of a class award, and enforcing courts should look carefully at the sites of the arbitration.

However, sometimes notice may be evaluated under the standards of the enforcing state.[51] The latter practice can be problematic for international class arbitrations as it shifts the focus from the due process standards of the arbitral seat to the due process standards of the enforcing state. Indeed, it may be difficult for arbitrators to anticipate where enforcement might take place when they render their awards. The reason why certain enforcing courts look at their own due process standards is based on alleged 'overlaps' between due process and public policy.[52]

48 For instance, in the US jurisdiction, notices should clearly state the nature of the action, the scope of the class, the class aims, issues or defenses and various procedural factors such as appearance through counsel, exclusion, and the binding effect of the action, biographical information about the class counsel and representatives, and how to communicate regarding the arbitration.

49 For instance, In the US, as opposed to Australia, publication is seldom considered as adequate and parties must give "best notice practicable, including individual notice to all members who can be identified through reasonable effort". For instance, notice sent by first-class mail to each putative class member, explaining the right to opt out of the litigation, has satisfied US due process concerns. Civil law concerns about representative actions may go further and mean that actual notice is required to bind non-representative class members. For more details, *see:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

50 *See: Unión de Cooperatives Agrícolas Epis-Centre v. La Palentina SA* (Fr. v. Spain) 27 Y.B. COM. ARB. 533, 538 (2002) (noting that sufficiency of notice must be considered in light of the arbitral rules the parties had agreed would apply) and Julian D.M. Lew *et al.,* Comparative International Commercial Arbitration para. 26-81 (2003).

51 *See: Jiangsu Changlong Chem. Co. v. Burlington Bio-Med. & Sci. Corp.*, 399 F. Supp. 2d 165, 168 (E.D.N.Y. 2005) (noting that an argument against enforcement requires a showing that the arbitration was conducted in violation of the due process standards of the enforcing state); Matti S. Kurkela & Hannes Snellman, Due Process in International Commercial Arbitration 1 (2005), p. 47 (noting that the procedural rules of state courts only apply if agreed upon by the parties).

52 *See,* for instance: *Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc.* (P.R.C. v. U.S.), 31 Y.B. COM. ARB. 1105, 1118 (2005) (citing U.S. Supreme Court precedent concerning due process requirements of notice in the context of an international enforcement proceeding); *Unión de Cooperatives Agrícolas Epis-Centre v. La Palentina SA* (Fr. v. Spain), 27 Y.B. COM. ARB. 533, 538–39 (2002) (noting procedural safeguards must be examined "in accordance with the criteria established by the Constitutional Court, which is the highest interpreter of the fundamental provisions in whose principles, rights and liberties international public policy is embodied"); *Italian Party v.*

Notice provisions affect the second main aspect of due process, i.e. one's ability to be heard or one's ability to present his case. Indeed, only after receiving sufficient notice and depending on the content of the notice, one can be able to defend oneself.

Again, different jurisdictions take different approaches to the extent one shall be able to present his case. For instance, some national laws require a "*full opportunity*" to present one's case, whereas others only require a "*reasonable opportunity*" to do so. [53]

Furthermore, if the arbitrator creates an opt-in (rather than an opt-out) mechanism for claimants who live in nations where representative relief has not been broadly adopted, "*this might be sufficient to overcome some civil law objections regarding the nature of representative proceedings*".[54]

5. Public Policy concerns

Under Article V(2)(b) of the New York Convention, recognition and enforcement of the award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to public policy of that country. Public policy concerns can be raised by the parties of the court *ex officio* and are not defined in the New York Convention.

The underlying rationale to public policy consideration is the right of the state and its courts to exercise ultimate control over the arbitral process.[55] Public policy is in its essence a fluid concept, changing to the needs of society.[56] It has therefore been defined as referring to *"violations of basic notions of morality and justice"*[57] and as reflecting the "*fundamental economic, legal, moral, political, religious, and social*

Swiss Co., 29 Y.B. COM. ARB. 819, 829 (2004) ("Denial of due process is in principle a violation of procedural public policy.").

53 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. (p. 62).

54 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

55 *See:* Julian D.M. Lew *et al.*, Comparative International Commercial Arbitration para. 26-114 (2003)

56 *See:* Julian D.M. Lew *et al.*, Comparative International Commercial Arbitration para. 24-114 (2003) and Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* Comparative Arbitration Practice- and Public Policy in Arbitration 177, 179 (Pieter Sanders ed., 1986).

57 *See:* International Law Association, Public Policy as a Bar to Enforcement of International Awards (2000) and International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002). (both are available at http://www.ila-hq.org/en/committees/index.cfm/cid/19.

standards of every state or extra-national community".[58] A distinction must be made between procedural (sometimes overlapping with due process issues) and substantive public policy.[59]

It is important to note that only a violation of the enforcing state's public policy with respect to international relations (i.e. "*international public policy*") is a valid defense.[60] In other words, the domestic public policy concerns of that state are not sufficient to refuse enforcement.

International public policy includes in particular "*concerns about biased arbitrators, lack of reasons in the award, serious irregularities in the arbitration procedure, allegations of illegality, corruption or fraud, the award of punitive damages and the breach of competition law*".[61]

Subsequently, practice teaches that only rarely awards have been successfully opposed at the enforcement stage as a result of violating international public policy.[62]

We concur with this practice and advocate for an arbitration-friendly approach on enforcement proceedings regarding class arbitration awards.

5. Conclusion

Objections to enforcement based on due process and/or public policy must be viewed from an international, rather than purely domestic, perspective.[63]

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58 See, for instance: P.B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 INT'L & OMP. L.Q. 1, 7 (1993) and *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras Al Khaimah Nat'l Oil Co.* [1987] 2 Lloyd's Rep. 246, 254.

59 *See:* Loukas Mistelis, *"Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of Foreign) Arbitral Awards*, 2 INT'L L. F. DU DROIT INTERNATIONALE 248, 253 (2000).

60 *See:* para. 10-11 of the International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/19; Yves Brulard & Yves Quintin, *European Community Law and Arbitration: National Versus Community Public Policy*, 18 J. INT'L ARB. 533, 546 (2001) (discussing application of European Community-wide public policy).

61 Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

62 For instance, England did not refuse enforcement of an arbitral award on the grounds of public policy until 1998 (see Soleimany v. Soleimany [1999] Q.B. 78) See also: Stephen M. Schwebel & Susan G. Lahne, *Public Policy and Arbitral Procedure, in* Comparative Arbitration Practice and Public Policy 205, 206 (Pieter Sanders ed., 1986) and Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration para. 10-51 (4th ed. 2004).

63 Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

There is "*no international consensus that class actions violate agreed notions of due process or public policy, instead, the trend goes in the opposite direction*".[64]

Many states, including several Civil Law countries that might otherwise be expected to object to representative actions as violative of national conceptions of individual procedural rights, have adopted strong pro-arbitration policies and should, therefore, be expected to uphold class arbitration awards.[65]

Furthermore, the policy reasons supporting international arbitration are in line with the policy reasons in favor of class actions. Therefore, "*as a matter of policy*", international class awards should be accorded the same presumptions of enforcement that are given to other international awards. [66] Further, it would harm the economic interests of parties and countries to let legal uncertainties slip into the exequatur of international class arbitral awards.

Not accepting the principle of enforcement of international class awards "*would create a hierarchy of 'acceptable' types of international arbitrations*" and may amount to denying enforcement "*based on grounds other than those contained within the New York Convention*".[67]

In summary, arbitration is expected and is allowed to adopt procedures that would not be permitted in national courts, and the enforcement of an international arbitral award does not require national courts to indicate their approval of a particular dispute resolution mechanism.[68]

64 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

65 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. P. 75.

66 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611. P. 75.

67 *See:* Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

68 Strong, S.I., Enforcing Class Arbitration in the International Sphere: Sue Process and Public Policy Concerns (2008). University of Pennsylvania Journal of International Law, Vol. 30, No. 1, 2008; University of Missouri School of Law Legal Studies Research Paper No. 2009-01. Available at SSRN: http://ssrn.com/abstract=1330611.

Class Actions And Arbitration in the European Union – France

Yves Derains* & Aurore Descombes**

1. Introduction

At a time when the possibility of introducing class actions in the French procedural landscape is contemplated, it is appropriate to discuss whether or not class actions are permissible in arbitration in France. The Class Action procedure, as developed by the United-States (hereafter the "US") Court system does not exist in France. However, over the past years, studies have been undertaken at both academic and political levels in order to study the possibility of introducing a special class action "*à la française*". Debates on this issue gave rise to several reports.[69] On May 26, 2010, Senators Laurent Béteille and Richard Yung, on behalf of the Senate Law Committee highlighted the need to institute a class action procedure in French law in order to reinforce weaker parties' rights, subject to the condition that any such actions be strictly compliant with French procedural principles in order to prevent abuse known in the US.[70] Class actions recently came again to the forefront now that Christiane Taubira, minister of justice in the newly constituted government, announced her intention to allow class action in France.[71] Although the debate on class action in French law focuses mainly on court proceedings, the repercussions of such introduction in the sphere of arbitration should not be underestimated. Class action would no longer be considered as a foreign legal concept and systematically contrary to French public policy or to international public policy.

Until now, class actions have been found unacceptable under French procedural law. Class action procedure as developed by the United States Court system allows one or several named plaintiffs to sue on behalf of a larger group of persons in a similar

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69 For an overvue of the latest debates and reports on the class action introduction in French law, *see:* Carole Landat-Shelley, « Introduire la Class Action dans le système juridique français : mythe ou réalité ? », Village de la Justice, 15.12.2010, avalaible in French on: http://www.village-justice.com/articles/Introduire-class-action-systeme,9260.html.

70 Information Report by Mr. Laurent Béteille and Mr. Richard Yung on behalf of the Senate Law Committee. N° 499 (2009-2010) – May 26, 2010 ; available in French on: http://www.senat.fr/rap/r09-499/r09-4991.pdf

71 « Christiane Taubira annonce des "class actions" à la française », in Le Monde.fr with Reuters updated on june 22, 2012, available on http://www.lemonde.fr/societe/article/2012/06/22/christiane-taubira-annonce-des-class-actions-a-la-francaise_1723025_3224.html

situation, for an injury done to them.[72] As set forth in Rule 23 of the Federal Rules of Civil Procedure, Chapter IV, when a person sues or is sued as a representative of a class, the court must first determine whether to certify the action as a class action. If the Court certifies the class, it must notify all members who can be identified to inform them of the start of the procedure. Therefore, as outlined by Ms. Gabrielle Nater-Bass "*the most controversial aspect of the US class action is that a judgment rendered in a class action is binding on all members of the class, unless a member choses to "opt out" of the class action.*"[73] In other words, a class member will be considered as a party to the procedure unless he or she expressly decides to "opt out". All the members of the class will be bound by the class judgment to be rendered, even if they did not receive the notice and consequently were not actually aware of the pending lawsuit. These two consequences of the US class actions procedure makes it unacceptable under French procedural law for various key reasons.

One reason why class action is seen to be fundamentally contrary to basic principles of French procedural law is related to the so-called principle "*Nul ne plaide par procureur*" as is laid down in Article 31 of the French Code of Civil Procedure ("CPC").[74] This principle prohibits filing a claim on behalf of someone else without being validly empowered by the latter. This procedural standard preserves the individual right to sue. The US "opt out" mechanism is incompatible with this principle because class members are deprived of their individual right not to bring legal action before Courts, to the extent that: (i) class members who did not opt out (because they did not respect the time limit fixed by the Court, or were not even aware of the starting procedure) within the opt out period are then definitively deprived of this right, and (ii) they will be bound by the Court decision, regardless of their real intention to participate in the procedure.

It is easy to understand the importance of such a principle under French Law in light of French group actions that have been found to be fully in line with the French procedural standards. As provided in Articles L1247-1 and L1251-59 of the *Code du Travail*,[75] for example, workforce representatives may bring any action resulting

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72 For a description of the class action, *see:* (1) Bernard Hanotiau, "Chapter IX: Classwide Arbitration" in *Complex Arbitrations: Multiparty, Multicontract, Multi-Issue and Class Actions,* Kluwer International Law, 2006, p.260; (2) Gabrielle Nater-Bass, << Class Action Arbitration: A New Challenge?>> ASA Bulletin, 2009, Vol.27/4, p.672.

73 Gabrielle Nater-Bass, op.cit., p. 673.

74 Article 31 of the C P C: "*L'action est ouverte à tous ceux qui ont un intérêt légitime au succès ou au rejet d'une prétention, sous réserve des cas dans lesquels la loi attribue le droit d'agir aux seules personnes qu'elle qualifie pour élever ou combattre une prétention, ou pour défendre un intérêt déterminé*". An English translation is provided by Legifrance at www.legifrance.fr : '*The right of action is available to all those who have a legitimate interest in the success or dismissal of a claim, without prejudice to those cases where the law confers the right of action solely upon persons whom it authorises to raise or oppose a claim, or to defend a particular interest.*"

75 Article L122-3-16 of the French Labor Code became article L1247-1. As settled in Article L1247-1« *Les organisations syndicales représentatives dans l'entreprise peuvent exercer en justice toutes les actions qui résultent du présent titre en faveur d'un salarié, sans avoir à justifier d'un mandat de l'intéressé. Le salarié en est averti dans des conditions déterminées par voie réglementaire et ne doit pas s'y être opposé*

from the enforcement of articles of the Code addressing fixed-term contracts and temporary employment contracts, without the need to be empowered by a designated plaintiff. In such a case, the employee is made aware of the initial procedure and may notify his or her decision to the Court to object to the proceeding within 15 days. The main difference with what occurs with US class actions is that the employee keeps control over the procedure and may at any time intervene personally in the procedure and decide to put an end to it. The implementation by judges of the above-mentioned provisions is strictly controlled by the *Conseil Constitutionnel* acting as a guardian of the Constitution and fundamental principles of the French judicial system.[76]

Another example of the importance of such standard under French Law can be found in the Consumer Code. This Code provides different types of actions, including the Representative action named "*action en representation conjointe,*" which is the nearest procedure in the French system to a US class action procedure[77]. As set out in Articles L422-1 to L422-3, associations duly authorized by at least two consumers, may start legal proceedings to obtain damages on behalf of these consumers. However, contrary to the US class action procedure, "[t]*he mandate may not be solicited by means of a public appeal on radio or television, or by means of posting of information, by tract or personalized letter. Authorization must be given in writing by each consumer."* Moreover, the ban on soliciting via advertising has been reinforced by the French Supreme Court, on November 30, 2011, by restating the

dans un délai de quinze jours à compter de la date à laquelle l'organisation syndicale lui a notifié son intention. Le salarié peut toujours intervenir à l'instance engagée par le syndicat et y mettre un terme à tout moment. »

Article L124-20 is now Article L1251-59. As set force in Article L251-59 « *Les organisations syndicales représentatives peuvent exercer en justice toutes les actions résultant de l'application du présent chapitre en faveur d'un salarié sans avoir à justifier d'un mandat de l'intéressé. Le salarié est averti dans des conditions déterminées par voie réglementaire et ne doit pas s'y être opposé dans un délai de quinze jours à compter de la date à laquelle l'organisation syndicale lui a notifié son intention. Le salarié peut toujours intervenir à l'instance engagée par le syndicat et y mettre un terme à tout moment* ».

76 *See* by way of example the decision of the Conseil Constitutionnel, July 25, 1989, decision n°89-257 DC.

77 Consumer Code, Representative Action (translation provided by Legifrance at www.Legifrance.fr), Article L422-1: *"Where several consumers, identified as natural persons, have suffered individual damages caused by the same business act and which have a common origin, any approved association recognized as been representative on a national level in application of the provisions of the part I may, if it has been duly authorized by at least two of the consumers concerned, institute legal proceedings to obtain reparation before any court on behalf of these consumers. The mandate may not be solicited by means of a public appeal on radio or television, or by means of posting of information, by tract or personalized letter. Authorization must be given in writing by each consumer.;* Article L422-2 *"Any consumer who has agreed, in accordance with the conditions provided for in article L. 422-1, to the institution of proceedings before a criminal court is, in this event, deemed to be exercising the rights conferred upon a civil party in application of the French code of criminal procedure. Notifications or notices concerning the consumer are, however, addressed to the association.";* Article L422-3 *"Associations instituting legal proceedings in application of the provisions of Articles L. 422-1 and L. 422-2 may institute a civil action before the juge d'instruction or juridiction de jugement in the place where the company against which the action is being taken has its registered office or, failing this, in the place where the first offence occurred."*

prohibition for a consumer association to use online-publicity to obtain mandates from others consumers[78].

Furthermore, the strength of *res judicata* contained in Article 1351 of the Civil Code[79] prohibits the enforcement of a Court decision against or on behalf of someone who did not participate in the litigation. The "opt out" mechanism is also considered to be inconsistent with the rights of due process of those members of the class who were not aware of the proceedings.[80]

Another important reason relates to the obligation of French lawyers to comply with professional rules set forth in the Decree of July 12, 2005 as well as in the National Regulation of the lawyers' profession (RIN).[81] French lawyers are not allowed to engage in any form of publicity in order to offer their legal services to specific clients. This prohibition is at odds with the American class action model, where lawyers are key players in the class action process by directly contacting potential class members prior to filing a lawsuit.[82] On September 30, 2008 the French Supreme Court ruled on this issue, confirming a decision of the Paris Court of Appeal dated October 17, 2006. Several lawyers had formed a limited liability company denominated "Class Action.fr." They offered technical assistance to lawyers interested in class action constitutions. For this purpose, a website was made available as a support to online class actions in order to provide information on such actions and to promote the registration of any potential member. The Supreme Court recalled that under French law it was prohibited for a lawyer to solicit clients.[83]

Are such reasons compelling in arbitration as well? Not necessarily, as few procedural rules applicable to courts apply to arbitration. However, it seems that the basic principles applicable to arbitration make it impossible to introduce class actions in arbitration in France, in international arbitration and in domestic arbitration alike.[84]

78 Cass. Civ. 1re 26 mai 2011, n°10-15-676, Assoc. Union fédérale des consommateurs- Que choisir v. SA société Bouygues Telecom, commentary by Anne Debet, « Interdiction pour une association de consommateurs de solliciter un mandat pour agir en justice par le biais d'un site Internet », Communication Commerce électronique n°9, Sept. 2011, comm. 77.

79 Under article 1350 of the civil code (English translation available on www.legifrance.fr): « *L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même, que la demande soit fondée sur la même cause ; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.* »

80 Agnès Viottolo, Margaux Nectoux, « Actions collectives : quel avenir pour les « class actions » ? », Les cahiers Lamy du CE- 2011100.

81 Available online (in French) : http://cnb.avocat.fr/Reglement-Interieur-National-de-la-profession-d-avocat-RIN_a281.html

82 J.P. Grandjean, «« Class Actions » américaines et ordre public français », Les Echos n°20613 du 11 février 2010, p.13.

83 Cass. Civ 1re, September 30, 2008, Pourvoi n°06-21.400, Decision n°909, *Société Class action.fr*.

84 International arbitration is defined in French law in Article 1504 of the CPC: "An arbitration is international when international trade interests are at stake"(Translation provided by Paris, the Home of international arbitration in " The 13 January 2011 Decree, The new French arbitration law, in French, English, Spanish and Portugue)

Before focusing on a possible introduction of class action in French arbitration, it is necessary first of all to recall general objections to the possible development of a "class action arbitration" which are inherent to the very nature of an arbitration procedure.

As already pointed out by M. Maximin de Fontmichel, arbitration is, in principle, a confidential process,[85] and such principle of confidentiality is seen as one of the main reasons why parties chose arbitration, at least in domestic arbitration. Such principle of confidentiality has been recalled in the new Article 1464, fourth paragraph, of the CPC, stating that in domestic arbitration the procedure is submitted to the principal of confidentiality, unless the parties have agreed otherwise[86]. To the contrary, a class action procedure would necessarily be public, and lawyers' motivation to constitute as wide a class as possible, and their interest in raising public awareness on the case (as commonly practiced in the United States) add to this element of publicity.

A second general objection is grounded on the principle of consent to arbitration. How to establish the jurisdiction of arbitrators in a class action procedure where the majority of the parties are signatories of different contracts, with possibly different arbitration clauses, or are not even aware of the existence of the procedure? Even if an arbitration clause provides for the possibility to introduce class action arbitration before an arbitral tribunal, such hypothesis does not resolve the substantive matter of consent to arbitration by the rest of the class members.[87]

In order to assess the possibility of class action arbitration under French law, a first determination is necessary: would the arbitration be domestic or international, as French law clearly distinguishes between domestic and international arbitration and different legal solutions apply to each of them. When France recently modernized its arbitration law in 2011,[88] it was decided to keep article 1504 of the CPC the definition of international arbitration introduced in the 1981 revision. As shown under note 15 above, an arbitration is international "*when international trade interests are at stake*". As a consequence, it is the transaction, and not the parties' nationality, that is the deciding factor in the procedural rules to be applied. [89] The Cour de

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85 Maximin de Fontmichel, « Arbitrage et actions de groupe- les leçons Nord-Américaines », Rev. Arb., Vol.2008/4, pp. 644-645 ; i.e. S. Kouris, « Confidentiality : Is International Arbitration Losing One of Its Major Benefits ? », Journal of International Arbitration, 22(2), 2005, p.127.

86 SeeYves Derains, « Les nouveaux principes de procédure : confidentialité, célérité, loyauté », in Le nouveau droit français de l'arbitrage, under the direction of Thomas Clay Lextenso éditions, 2011, p.101. The principle of confidentiality does not apply to international arbitration.

87 For an overview of the US Court practice in relation to class action arbitration, you may referred to: Maximin de Fontmichel, « Arbitrage et actions de groupe- les leçons Nord-Américaines », Rev. Arb., Vol.2008/4, pp. 641-658.

88 Decree n°2011-48, January 14, 2011.

89 Yves Derains and Laurence Kiffer, France, in Jan Paulsson (ed), International Handbook on Commercial Arbitration, Kluwer International March 2010, Supplement N°58, p. 1,2. for the solutions under the previous law which remains applicable.

cassation recently recalled that "*the economic nature of the international arbitration definition requires that the dispute referred to the arbitrator involves an operation which is not economically settled in a sole country* ». [90]

In general, rules applicable to domestic arbitration are stricter than rules applicable to international arbitration and subject to greater control from French courts. [91] However, although substantial differences between these two types of arbitration exist, common principles applicable to both may interfere with class action procedure and, as a result, may have direct repercussions on the possible development of class actions arbitration in France. It goes beyond the scope of this report to recall in detail such provisions. They can be found in Articles 1442 to 1503 of the CPC, as far as domestic arbitration is concerned, while international arbitration is regulated by Articles 1504 to 1527of the CPC. Only those provisions which may impact the issue of the introduction of class arbitration under French law will be briefly mentioned hereinafter.

First, Article 1444 of the CPC, applicable to domestic arbitration, deals with the direct appointment of arbitrators by the parties in an arbitration clause, or to the appointment of arbitrators by reference to specific arbitration rules. Pursuant to Article 1452 of the CPC, the appointment of such arbitrators belongs to the "arbitration organizer" or to a national judge called "*juge d'appui*" in case the parties do not agree on the sole arbitrator, or the third arbitrator's appointment in case three arbitrators are required. The same applies if one of the parties does not nominate or appoint a member of a three persons tribunal. Article 1453 of the CPC states that the arbitration organizer is also in charge of appointing arbitrators in case of a multiparty arbitration and if parties do not reach an agreement on arbitrators' appointment. Similarly, Article 1506 sets out that, *inter alia*, Articles 1452 to 1458 of the CPC shall apply to international arbitration, otherwise agreed by the parties.

Articles 1464 and 1510 of the CPC make reference to the enforcement of the principle of an adversarial process by Courts and Tribunals. In particular, Article 1510 provides the Tribunal with the duty to ensure equality between parties.

One significant difference between domestic and international arbitration is found in the requirement of a written arbitration clause or agreement in domestic arbitration as a condition of their validity (Article 1443 of the CPC) while such a requirement does not exist for international arbitration.

90 Cour de cassation, Civ.1re, Jan. 26, 2011, D.2011 n°5, « *L'internationalité de l'arbitrage fait appel à une définition économique selon laquelle il suffit que le litige soumis à l'arbitre porte sur une opération qui ne se dénoue pas économiquement dans un seul Etat.* »

91 Guido Carducci, "The Arbitration Reform in France: Domestic and International Arbitration Law, Arbitration International", Kluwer Law International 2012 Volume 28 Issue 1, p.147.

An award will be granted the exequatur in France provided it is not manifestly contrary to public policy (domestic awards, pursuant to 1488 of the CPC) or international public policy (awards rendered abroad or in France in an international arbitration, pursuant to Article to 1514 of the CPC). An action to set aside the award is available against domestic awards (Article 1492 of the CPC) and awards rendered in France in an international arbitration (Article 1520 of the CPC). Such an action amounts to a recourse against the decision of exequatur. A direct recourse is opened against the exequatur of an award rendered abroad. The grounds are those of Article 1520 of CPC for setting aside awards rendered in France in an international arbitration.) The grounds to set aside a domestic award (Article 1492) and an award rendered in France in an international arbitration (Article 1520) are very similar : (1) the tribunal had no jurisdiction or wrongly declined jurisdiction; (2) the tribunal was irregularly constituted, (3) the tribunal ruled without complying with the mission conferred upon it (4) the principle of an adversarial process had not been complied with; or (5) the award is contrary to public policy (Article 1492 of the CPC) or international public policy in an international sense (Article 1520 of the CPC), depending on the characterization of the arbitration. Specific formal conditions must also have been controlled in the case of domestic arbitration, which have no bearing on the present study.

In light of the above general information, it is now possible to consider the practical and legal difficulties raised by the introduction of class actions under French law in domestic arbitration (I) and in international arbitration (II).

2. Class actions and French law on domestic arbitration

As emphasized in the introduction to the present report, class actions in France do not exist. French law has its own mechanisms for group actions and in order to protect fundamental procedural principles, class action has not been introduced so far in the French legal system. Several scholars highlighted that as long as the class action is continued to be considered as a foreign legal concept, class action arbitration will not be admitted in France.[92] The main reason for this may be found in the arbitral procedure itself, including rules on the jurisdiction of the arbitrators (A) and the solutions applicable to the exequatur or annulment of domestic awards (B).

2.1. Procedural issues that may constitute an obstacle to class action arbitration development in domestic arbitration

No class action arbitration can be exercised through arbitration unless it is established that the subject matter of the dispute is arbitrable (jurisdiction *ratione materiae*) (1) and that every class members are bound by the arbitration agreement (jurisdiction *ratione personae*) (2).

92 Gabrielle Nater-Bass, *op. cit.*

2.1.1. Jurisdiction ratione materiae

Under French law, State courts have exclusive jurisdiction on certain claims because of the nature of the dispute, in particular when one of the parties requires special protection. As a result, those issues are not arbitrable and the exclusive jurisdiction *ratione materiae* of the French courts deprives arbitrators of jurisdiction in fields where resorting to class actions is often advocated, such as individual relationships between employees and employers (a) and (b) the field of consumer law.

a. Individual relationship between employees and employers

Individual relationships between employees and employers constitute a significant part of the class action litigation in the US. These contractual relationships may also be arbitrated since the American Supreme Court, in the *Circuit City Stores, Inc. v. Adams* case dated March 21, 2001[93] ruled that labor contract claims in federal or international arbitration are valid.

This will remain impossible in France as long as individual relationships between employees and employers are not arbitrable. The confirmation of the latter can be found in Article L1411-4 of the *Code du Travail* . Pursuant to this article, the French labor Court, namely the *Conseil des Prud'hommes*, has exclusive jurisdiction on individual relationships between employees and employers. As a consequence, any agreement or convention stating otherwise is invalid.

In case of an existing doubt as to the contract's characterization, the arbitrators do not any longer have jurisdiction to determine whether the contract is a labor contract settling individual relationships between employee(s) and employer(s) or not and, in the negative, to find themselves that they have jurisdiction to arbitrate the dispute. Recently, the *Cour de Cassation* excluded the traditional *competence-competence* rule when individual relationships between employees and employers may be at stake.[94] In other words, arbitral tribunals have no jurisdiction to decide whether they have jurisdiction when it is argued that the dispute could be in such labor field. The French Supreme Court ruled that even when the contract is not expressly designated as a labor contract by the parties, the existence of an arbitral clause does not prevent the *Conseil de prud'hommes* from declaring its exclusive jurisdiction in order to decide whether such contract should be characterized as a labor contract and consequently the arbitration clause as null and void.[95]

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93 Alexis Weil, «Arbitrage et droit du travail aux Etats-Unis », available on the University Paris X Nanterre's website at: http://m2bde.u-paris10.fr/content/arbitrage-et-droit-du-travail-aux-etats-unis-par-alexis-weil.

94 Cass Soc, November 30, 2011, claim n°11-12905.

95 Eric Borysewicz et Gilles Jolivet, « Arbitrage et droit du travail : le principe compétence-compétence n'est pas applicable en matière prud'homale », Alerte Jurisprudence, 13.12.2011, available in French at : http://bakerxchange.com/ve/ZZL3171618281Mj8295J4.

The French Supreme Court put an end to any attempt to bring claims involving employees and their employers before arbitral tribunals, let alone to bring any class action arbitration related to such contractual relationships.

b. Consumer law

Consumer law is the field of predilection for class actions in the US. It is therefore useful to assess the possibility for an arbitral tribunal to retain jurisdiction on a class action arbitration involving consumers, when considering the possible development of domestic class action arbitration in France. Otherwise, class action arbitration would be deprived of one of its most important area of application.

Under French law, as set out in Article 2061 of the Civil Code, an arbitral clause is only valid in contracts entered into in relation with a professional activity pursued by both parties. As a consequence, any arbitration clause included in contracts signed between a non-professional, such as a consumer, and a professional is deemed to be an abusive clause.

The *Cour de Cassation* recently confirmed the principle laid down in Article 2061 of the Civil Code when ruling that an arbitration clause included by former professionals (already retired at the time of execution), in a contract entered into with a professional was not valid and deprived of any effects.[96] However, this prohibition applies to the arbitration clause only (*Clause compromissoire*) and not to the arbitration agreement executed after the occurrence of the dispute (*Compromis*). This was confirmed by the Cour de Cassation which stated that an arbitration agreement entered into between the insured person and the insurer after the dispute had arisen (when no arbitration clause was included in the insurance contract), would not be considered as a clause included in a contract signed between a professional and a consumer and, as a consequence, as an abusive clause.[97] But the Cour de Cassation recalled indirectly at the same time that any arbitration clause part of a contract between a professional and a non-professional or a consumer is abusive and should be deemed unwritten. As pointed out by Ms. Anne Pélissier, an arbitration clause would be systematically considered as an abusive clause for the reason that the contractual relationship would be characterized by an imbalance of knowledge between the parties.[98] The non-professional would probably have not even read this clause to be considered as "secondary" in standardized contract policies.

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96 Cass. Civ. 1re, February 29, 2012, claim n°11-12782, commentary by Joël Monéger, Activité professionnelle des parties et clause compromissoire, La semaine Juridique Entreprise et Affaires n°19, May 11, 2012, 1314.

97 Cass. 1re civ., February 25, 2010, claim n°09-12126, commentary by Anne Pélissier, « Le compromis d'arbitrage n'est pas une clause abusive », La semaine Juridique Edition Générale n°24, June 14, 2010, 659

98 Eric Borysewicz et Gilles Jolivet, « Arbitrage et droit du travail : le principe compétence-compétence n'est pas applicable en matière prud'homale », Alerte Jurisprudence, 13.12.2011, available in French at : http://bakerxchange.com/ve/ZZL3171618281Mj8295J4.

In the light of this decision of the Cour de Cassation, a group of consumers might arbitrate their claims provided that each of them or their representative enters into an arbitration agreement with the future respondent(s) before bringing their claim before an arbitral tribunal. However, this cannot be characterized as a proper class action since none of the consumers is suing on behalf of a class but on his or her behalf. For the other members, the problem of arbitrability remains, let alone the problem of the *ratione personae* jurisdiction of the arbitrators which is a hurdle in the path of any class action in the field of arbitration, whichever is the subject matter of the dispute.

2.1.2. Jurisdiction ratione personae

Once the arbitral tribunal is constituted, even when members of a group have validly submitted a dispute to arbitration and the subject matter is arbitrable, arbitrators will have to determine the scope of the tribunal's jurisdiction from a *ratione personae* point of view, with respect to all the members of the same group who expressed no will to claim and to arbitrate. They will have to decide whether the arbitration clause either included into a contract or in an arbitration agreement reached after the dispute came up, may be extended to several other third parties to different contracts, because of a common injury done to all of them. This is the core of the difficulty to extend arbitration into the field of class actions, even if the concept is accepted for court proceedings.

In domestic arbitration, Article 1443 of the CPC requires a written consent to arbitration. This excludes the extension of the arbitration clause to third parties to similar contracts having suffered the same injury, if no compatible written arbitration clause is included in every single contract and if class action arbitration is not expressly contemplated in those arbitration clauses. The best scenario would be that all the contracts have the same or at least a similar and compatible arbitration clause (as standard contractual forms as mainly used in consumer contracts), with specific provisions making class action arbitration possible under such contracts. The application of arbitration clauses to no signatories is a well-known issue as is multicontract arbitration. However, the best scenario, as described above, is very far from a traditional group of contracts doctrine and/ or multicontract arbitrations.

The group of contract doctrine "*concerns multiple related contracts that are not linked to the same arbitration agreement and which are entered into by the same parties.*"[99] Mr. Fernando Mantilla-Serrano also commented that "*Multiparty situations concerning multiple contracts could include varying contractual scenarios, including horizontal contractual relationships in which one party signs different contracts with multiple parties,*

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[99] Fernando Mantilla-Serrano, « Multiple parties and multiple contracts : divergent or compatible issues ? », in *Multiparty Arbitration*, edited by Bernard Hanotiau and Eric A. Schwartz, Dossiers VII ICC Institute of World Business Law, 2010, p. 13.

vertical contractual relationships in which each party signs two related contracts with two different parties (…)."[100] This doctrine does not provide any remedies in order to resolve problems of consent to class action arbitration. As pointed out by Mr. Fernando Mantilla-Serrano, the group of contracts doctrine raises a fundamental question related to the subject matter that parties consented to submit to arbitration. Pursuant to the definition of group of contracts, the contracts are entered into by the same parties. However, in class action arbitration, different parties would have entered into a multitude of independent contracts. The only possible common party to all of these contracts would be the defendant(s). Furthermore, economic considerations remain the most important criteria to characterize a group of contracts.[101] In class action arbitration, there is neither an economical nor operational link between the parties; the members of the class generally do not know each other. Every single contract entered into between a class member and the respondent(s) is part of an independent economical and contractual relationship, in no way related to the others.

2.2. The impossible recognition and enforcement of a domestic class action arbitration award

Assuming that the problems of arbitrability and jurisdiction just discussed have been overcome, an award resulting from a domestic class action arbitration would nevertheless be annulled or would not receive exequatur in France. This observation results from the conditions set out in Article 1492 of the CPC, which apply to the setting aside of domestic awards, and which are extended to the appeal of exequatur decisions by Article 1499 of the CCP.

As recalled in the introduction to the present study, Article 1492 of the CPC entitles parties to bring an action before the Court of Appeal to request the annulment of arbitral awards. Among the six grounds for annulment, four of them concern more particularly class action arbitration. The first one, the lack of jurisdiction, has already been discussed in detail in the above section. Other grounds for annulment have to be taken into consideration, as they may also constitute serious obstacles to the development of class action arbitration in France. Pursuant to paragraph 2 of Article 1492 of the CPC, the award can be annulled when the tribunal has not been properly constituted (1) ; the same occurs according to paragraph 4 when due process was violated (2) and, pursuant to paragraph 5 when the award is contrary to public policy(3). This makes the development of class action arbitration under French law even more improbable, as arbitrators or arbitral institutions faced with such issues will never take the risk to make or have made an award that would have very few chances to be recognized or enforced.

100 *Idem.*
101 *Idem.*

2.1.1. Tribunal constitution and arbitrators' appointment

According to the US class action system, absent class members do not have the possibility to participate in the choice of an arbitrator, as arbitrators are appointed by class members' representatives on behalf of identified class members as well as absent class members. Furthermore, as underlined by Gabrielle Nater- Bass, "*the defendant is deprived of the possibility to appoint his arbitrators for each individual dispute with a class member*". [102]

This is contrary to the fundamental procedural principle recalled in a famous French case, by the Cour de Cassation. The French Supreme Court ruled, in *Sociétés BKMI et Siemens v. Société Dutco,*[103] that the principle of equality requires that each party enjoys the same right in the appointment of an arbitrator and that the appointment of only one party-arbitrator on behalf of a group of parties by an arbitral institution violates this right.[104] The principle of equality was said to be of public policy by the Cour de Cassation which implies that when it is not respected, the arbitral tribunal cannot be said to have been properly constituted. It is in order to allow arbitral institutions to respect this principle of equality that Article 1453 of the CPC, adopted with the 2011 revision of French law on arbitration rules, authorizes the institutions administering the arbitration or, failing such institution, the judge, to appoint all the arbitrators when there are more than two parties to the dispute and when they fail to agree on the procedure for constituting the arbitral tribunal.

In a hypothetic class action arbitration procedure, some class members are not aware of the ongoing procedure. Therefore, those class members will not be able to participate in the arbitrator's appointment and the principle of equality will be breached.

Mr. Ricardo Ugarte and Mr. Thomas Bevilacqua have suggested an interesting solution after analyzing the French Courts' interpretation on the parties' equality principle in the tribunals' constitution in multiparty arbitration. They noted that the decisions dealt with "*the constitution of a Tribunal when a single claimant commences an arbitration that names several respondents and those respondents were parties to different agreements in the overall multi-contract scheme governing the project in question*", or problems "*involving constitution of the tribunal (…) when separate ongoing arbitrations involving the same project are sought to be consolidated, particularly, again, when the respondent parties are not all parties to the same contracts*". Even if the context described is quite different from that of the class actions, the solution

102 Gabrielle Nater-Bass, *op. cit.*, p.684.

103 Cour de Cassation, Judgment of January 7, 1992, Rev. arb. 1992, p. 470 and English translation is available in 18.Y.B. Com. Arb. 140 (1993).

104 Ricardo Ugarte & Thomas Bevilacqua, "Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration : An Update on the Governing Provisions", Journal of International Arbitration 27 (1), 2010, p.11.

elaborated by the authors in light of the French Courts' requirements, and in line with the *Dutco* decision, suggests that the arbitration clause sets out the parties' express agreement to *"(1) first allow for a certain defined period of time following the appearance of the dispute for each "side" (claimant(s) and respondent(s)) to agree on a single arbitrator; and (2) in the event that either side fails to designate an arbitrator within the defined period of time, then all the arbitrators are to be selected by a trusted arbitral institute"*. According to the authors: "*This solution would maintain party equality in the designation process and be workable regardless of the number of parties involved and regardless of the interests each has in the dispute.*"[105]

Although this solution would not solve all pending obstacles to the development of class action arbitration in France, but it would contribute to facilitate an arbitral tribunal's constitution in accordance with legal and Court's requirements, despite the plurality of claimants and/or respondents. Furthermore, by transferring the arbitrator's appointment task to a third institution, equality between identified and absent class members would be also preserved.

2.1.2. The enforcement of due process

Article 1464 of the CPC which is applicable to arbitral proceedings in domestic arbitration refers to Article 16 of the same code. Under Article 16 of the CPC arbitrators have the duty to organize the procedure in order to ensure the enforcement of the principle of an adversarial process. It is a basic element of due process.

As recalled previously, in US class action arbitration, some class members are not able to participate actively in the procedure because they merely ignore its very existence. How could arbitrators fulfill their mission in conformity with Articles 1464 and 16 of the CPC if all class members are not informed of the claim they are deemed to have submitted before the arbitral tribunal, and enforce of the principle of an adversarial process if class members cannot participate in practice?

In the light of the present state of French law, breach of the adversarial principle or, more simply, of due process, is an inevitable ground for annulment of an award issued as a result of a class action arbitration procedure or for refusal of its recognition or enforcement.

2.1.3. Public policy concerns

Pursuant to Article 1492 (5) of the CPC, a domestic awards contrary to public policy may be annulled. Furthermore, no award manifestly contrary to public policy may

[105] Ricardo Ugarte & Thomas Bevilacqua, "Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration : An Update on the Governing Provisions", Journal of International Arbitration 27 (1), 2010, p.47.

receive the exequatur pursuant to Article 1488 of the CPC and the exequatur granted to an award which is simply contrary to public policy, although not manifestly, may be nullified. Several of the fundamental standards that have already been mentioned as preventing the enforcement of class action arbitration in France have already been characterized as public policy principles.

As already mentioned, the *Cour de Cassation* ruled in the *Dutco*[106] case that "*the principle of equality of the parties in the designation of arbitrators is a matter of public order, and may not be waived except after the dispute has arisen*"[107]. The same applies in respect of due process and, even if the principle '*nul ne plaide par porcureur*" has not been characterized explicitly as being part of the public policy by the *Conseil Constitutionnel*, it was included within the Constitutional rights. Indeed, the *Conseil Constitutionnel* stated, in a decision of July 25, 1989,[108] that it was absolutely necessary for workforce representatives to obtain the employees' individual agreement to the procedure, otherwise "*failure to respect such individualized agreement, which does not exist, by way of example, in "opt-out" Anglo-Saxons mechanisms, the individual would be abusively deprived of a Constitutional right.*" [109] Such a decision constitutes a serious ground for a future award annulment based on article1492 (5) of the CPC.[110]

In light of the present state of French law on domestic arbitration, the introduction of domestic class action arbitration appears to be impossible in France. Certain issues may be resolved by adapting practices related to the arbitrators' appointment and entering more frequently into arbitration agreement after the dispute has arisen. Notwithstanding, the others hurdles cannot be overcome without legislative reform.

3. Class actions and French law on international arbitration

As it has been summarized, "[*T]he international arbitration regime governs international arbitration proceedings having their seat in France, as well as the recognition and enforcement of arbitral awards rendered in France – with regard to an international dispute – or rendered abroad – with regard to disputes of an international or a domestic character.*"[111] International arbitration may be seen as offering more opportunities

106 Siemens AG and BKMI Industrienlagen GmbH v. Dutco Construction Company, 119 JDI 708 (1992)

107 Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XVIII (1993), p.40; and see also Ricardo Ugarte & Thomas Bevilacqua, "Ensuring Party Equality in the Process of Designating Arbitrators in Multiparty Arbitration: An Update on the Governing Provisions", Journal of International Arbitration 27 (1), 2010, p.11.

108 Conseil Constitutionnel, July 25, 1989, decision n°89-257 DC.

109 Agnès Viottolo, Margaux Nectoux, « Actions collectives : quel avenir pour les « class actions » ? », Les cahiers Lamy du CE- 2011100 ; Jacques Lemontey, « Les "class actions" américaines et leur éventuelle reconnaissance en France », JDI N°2/2009, p.553.

110 Jacques Lemontey, « Les "class actions" américaines et leur éventuelle reconnaissance en France », JDI N°2/2009, p.553.

111 Guido Carducci, The Arbitration Reform in France: Domestic and International Arbitration Law, Arbitration International, Kluwer Law International 2012 Volume 28 Issue 1, p.129.

for class action arbitration, because international arbitration rules are less strict and more flexible than the rules applicable to domestic arbitration in France. However two situations must be distinguished: on the one hand the enforcement in France of an arbitral award rendered abroad in a class action arbitration (1); on the other hand, the possibility to organize in France a class action arbitration in an international case.(2)

3.1. The enforcement in France of an award rendered abroad in an international class action arbitration

Some arbitral institutions have adopted rules providing for class action arbitration.[112]Yet, to the best of our knowledge, the enforcement of a class action arbitration award rendered abroad has not already been tested before the French Courts.[113] It is probably because class action arbitration remains an emerging practice, even in the US. But it remains that an arbitral procedure may take place in a foreign country where such procedure is admitted and its enforcement may be sought in France. It is noteworthy that French Courts have been already confronted to class actions procedures taking place before US Courts. Unfortunately, their reaction provided no indication of what is likely to happen if a French court of appeal is confronted with a class action arbitral awards rendered abroad.

In the *Vivendi* case[114] French Courts had an opportunity to adopt a position regarding a class action involving French class members as French shareholders of Vivendi Universal, SA. The US Plaintiffs requested before US Courts the certification of a class consisting of "*all persons, foreign and domestic, who purchased or otherwise acquired ordinary shares or American Depositary Shares (ADS) of Vivendi Universal, S.A*". Consequently, any purchaser of Vivendi stock would become a member of the US class action constituted for this purpose, regardless of his or her home country and, he or she would be bound by the Court's decisions unless he or she would have expressly notified a decision to "opt out". The French Courts lost this opportunity to express a position as to the possibility to recognize and enforce a Court's class action decision in France.[115] The New York Southern District Court, on March 22, 2007,[116] had admitted in the class French shareholders who had bought shares in the New-York stock exchange as well as in the Paris stock exchange through a very

112 Gary B. Born, « Parties to International Arbitration Agreements – F. Class Arbitrations », in *International Commercial Arbitration,* Kluwer Law International, 2009, p. 1231.

113 Maximin de Fontmichel, « Arbitrage et actions de groupe – les leçons Nord-Américaines », Rev. Arb., Vol.2008/4, pp. 641-658.

114 J.F. Dubos, F. Crépin, Affaire Vivendi.- Quand le juge américain s'érige en défenseur de la souveraineté judiciaire française », La semaine Juridique Edition Générale n°36, 5/09/2011, 944 ; J.P. Grandjean, « Class Actions » américaines et ordre public français », Les Echos n°20613 du 11 février 2010, p.13 ; Blake Redding, "If Class Actions Do Not Come To The French, The French Can Go to Class Action", RDAI/IBJL, N°3, 2007, pp.351 s.

115 Blake Redding, *op. cit.*p.351.

116 Trib. Fed. New York Southern District, Decision March 22, 2007, Vivendi Universal, S.A. Sec. Litig., 242 FRD 76.

"flexible" interpretation of French law. It is interesting to note that defendants had argued that the "opt out" system would be contrary to the doctrine "*nul ne plaide par procureur,*" to due process under French law which requires "*that a French citizen cannot be made plaintiff without his knowledge,*"[117] to the *principe du contradictoire* (adversarial procedure). It was also suggested that the prohibition of contingent fees to lawyers in France was incompatible with class actions.[118] The US Court thought international public policy as the "most problematic" issue, since France did not allow "opt out" class actions.[119]

At the same time, two claims were challenged before French Courts. The first claim was brought by a French shareholder who protested against the publicity made in France with the intention of informing potential French class members on the class constitution in the US and on their right to "opt out" within a certain period. The claimant argued that such time limit restriction contravened the right to privacy by obliging class members to reveal confidential information so as to "opt out". The *juge des référés* refused to rule on the violation of privacy by deciding that no unlawful disturbance was established.[120] After the New-York Southern District Court's decision to include French shareholders in the class, Vivendi decided to introduce a claim before the *Tribunal de Grande Instance* on October 8, 2009 and then, after the dismissal of such claim, before the Paris Court of Appeals. [121] Vivendi was alleging that several French shareholders were committing an abuse of forum shopping before US Courts, because even in the hypothesis where Vivendi would win the procedure on the merits in the US, loosing French shareholders would then be able to introduce a new claim before French Courts as the class action decision rendered by US Courts would never be recognized in France. [122] French Courts had a new opportunity to value the scope of a US class action decision in France; however they bypassed this question by considering that they had no jurisdiction to rule on an ongoing procedure and a future decision.

Finally, on February 17, 2011, the Southern District of New York issued a post-verdict opinion holding that under the Supreme Court's decision in *Morrison v. National*

117 Blake Redding, *op. cit.* p.351.

118 Pursuant to article 10 of the law dated July 10, 1991 and to article 11.3 and 21.3.3 of the RIN, the "*pacte de quota litis*" is prohibited. The fees shall partially be determined depending on the result, and any agreement settling success fees only, would be null and void. However, such prohibition seems not to apply to foreign lawyers (CA Paris, June 25, 1981, Gaz. Pal 1982, 1, somm. 9.) and not to be contrary to international public policy (Civ. 1er, February 28, 1984, Rev. crit. DIP 1958, 131, commentary by E. Mezger.) to the extent that such remuneration is not abusive (CA Paris, July 10, 1992, D. 1992, 459, commentary by Jarrosson). For further information: Henri Ader/ André Damien, Règles de la Profession d'Avocats, Dalloz Action, 2008-2009, paragraph 46.27, pp. 423-424.

119 Blake Redding, *op. cit.* p.355; and J.P. Grandjean, *op. cit.*

120 Under article 873 of the CPC, the President of the *Tribunal de Première Instance* may, in emergencies, adopt any conservatory or reinstatement measures, in order to prevent imminent damages or to put an end to a manifestly unlawful disturbance.

121 CA Paris 28 avril 2010, Rôle : 10/01643.

122 J.F. Dubos, F. Crépin,,*op. cit.*

Australia Bank Ltd., Section 10(b) of the Exchange Act did not apply extraterritorially and thus did not reach the claims of investors who purchased Vivendi Universal's shares on a foreign exchange. As a consequence, all French shareholders who acquired these shares in the Paris stock exchange were excluded from the class action and the issue was closed, at least momentarily, as far as enforcement in France is concerned.

Any decision in the *Vivendi* case on the recognition and enforcement in France of court decisions rendered abroad in class action procedures would have contributed to the debate on the same issue when the decision to be recognized or enforced is an arbitral award. Their reluctance to enter into this sensitive and complex issue only shows that the acceptance by the French legal system of a class action decision rendered abroad, by a court or by an arbitral tribunal is far from being obvious. It is our suggestion that even if it were accepted in the case of court decisions, there would still be a long way to go as far as arbitral awards are concerned, although some of the difficulties mentioned with respect to domestic awards may be overcome at the international level.

The grounds for opposing the recognition or the enforcement of an award rendered abroad are very similar to those grounds applicable to domestic awards which have been singled out above as specific obstacles in the case of awards made in a class action arbitration. As Article 1492 of the CPC, Article 1520 provides for annulment in case of (1) lack of jurisdiction of the arbitrators, (2) irregular constitution of the tribunal, (4) the breach of due process. The only significant difference between the two provisions with a bearing on class actions is that contradiction to public policy is not a sufficient ground: the recognition or enforcement will be denied only when the award is contrary to international public policy.

This has a consequence in the field of arbitrability which, as it has been explained above, limits the *ratione materiae* jurisdiction of the arbitrators in matters where class actions play an important role. The scope of international public policy is narrower than the scope of domestic public policy and rights acquired without fraud, abroad and in accordance to the applicable law may produce effects in France although the acquisition of such rights in France would be contrary to public policy, as recalled by the Cour de Cassation in the famous *Rivière* case in 1953.[123] As a consequence, if an arbitration clause is valid in labor disputes or consumers' disputes under the foreign law applicable to it, the lack of jurisdiction of the arbitrators for absence of a valid arbitration clause should not be, as such, an obstacle to the recognition or enforcement in France of an award rendered in a class action arbitration. However, this is probably the only point where the same conclusion as those reached for domestic arbitration cannot apply.

[123] Cass. civ., 17 avr. 1953, Rivière : Rev. crit. DIP 1953, p. 412, note H. Batiffol.

Indeed, a class member who has no interest in the recognition of an award validly rendered abroad in a class arbitration will always be legitimate to object to its recognition, on the rationale that: (i) he or she did not sign the arbitration clause or agreement or that (ii) he or she was not aware of the pending procedure, or (iii) was not able to participate to the tribunal constitution. Likewise, the arbitral tribunal has to guarantee the equality of parties and the principle of an adversarial process, whatever the procedural rules or law chosen by the parties or the arbitrators.[124] According to the Paris Court of Appeal "*the implementation of the principle of an adversarial process implies that the parties be placed on an equal position before the judges.*"[125] It had already ruled that this principle must be considered as a matter of international public policy, in a case where the arbitrators were criticized for having breached the principle of equality between the parties. In this case, the arbitrators had refused the right to one of the parties to make use of new elements showed after a first award, while the second party had the possibility to do so. The Paris Court of Appeal recalled that '*the principle of equality between parties- to be considered as a general procedural principal part of the international public policy- was not contravened in the present case.*"[126] There is no doubt that such equality is not respected in case of US type class action arbitration as parties are involved in the proceedings without their consent and sometimes even without their knowledge.

3.2. The organization in France of an international class action arbitration

The reasons which makes most improbable the recognition or enforcement of an award rendered abroad in a class action arbitration should discourage the choice of France as the seat of an international class action arbitration. Even if the parties and arbitrators enjoy a large freedom in the choice of the rules or the law applicable to the proceedings and in spite of a relaxation of the principles of arbitrability on matters not governed by French law, the lack of consent of some class members to arbitration and their resulting refusal to participate in the proceedings are hindrances which cannot be overcome in the present state of the law. It is true that pursuant to article 1522 of the CPC the parties may waive their right to set aside the resulting award. However, this needs a special agreement of the parties, which implies their acceptance of the arbitration. This cannot be achieved just by not "opting out". If it could be done this way, all this discussion on the introduction of class arbitration in France would be meaningless.

124 Article 1510 of the CPC.

125 CA Paris, pôle 1, ch. 1, 17 nov. 2011, n° 09/24158, n° 10/18561 et n° 10/19144, Sté Licensing Projects SL et a.

126 CA Paris 25, mai 1990 : Rev. crit. DIP 1990, p. 753, obs. B. Oppetit ; Rev. arb. 1990, p. 892, note M. de Boisséson ; Xavier Boucobza & Yves-Marie Serinet, Les principes du procès équitable dans l'arbitrage international, JDI n°1, 2012, §13.

4. Conclusion

The inevitable conclusion of this contribution is that French law, in its present state, is incompatible with class actions arbitration, not only in France, but also at the international level. No class actions arbitration can be validly organized in France, be it domestic or even international and an award rendered abroad would not be recognized or enforced. There is one main reason which is the basis of this incompatibility and which is not specific to arbitration: under French law, no party may be a claimant unless it expresses individually its will to sue, is duly represented, agrees on the claim and remains free to end it at whim. This explains that the "opt out" system may be seen as being contrary to the Constitution.[127] Since the class member who did not "opt out" and did not participate in the proceedings is not a proper party to such proceedings, no decision can be *res judicata* as far as it is concerned. Once this fundamental problem is resolved, most of all the hurdles mentioned in this contribution concerning class action arbitration would disappear easily: as soon as all class members who did not "opt out" are nevertheless deemed to be represented in the arbitration proceedings, principles such as the equality in the constitution of the arbitral tribunal and due process are respected. But it is doubtful whether it is possible to introduce an "opt out" system in French law without a constitutional reform and that is the reason why the Senate's Commission Report of 2010 suggests on the contrary an "opt in" system where associations of consumers or others groups would be authorized to sue on behalf of claimants having expressly agreed to be represented.[128] However, two difficulties specific to the jurisdiction of the arbitrators would remain: the consent of all members of the class to arbitration would have to be established; the dispute should be arbitrable.

The establishment of claimants' consent should not be a serious problem when the respondent had entered with all of the claimants into an identical arbitration clause[129]. But when the arbitration clauses are different, let alone incompatible, the execution of an arbitration agreement after the class has been constituted seems necessary. It is probably achievable if a "opt in" system is introduced as the respondent may prefer to have one procedure and not one for each arbitration clause. Arbitrability requires a specific legislative action, parallel to the introduction of class actions into the French legal system. Indeed, authorizing class actions to the benefit of consumers, as it seems to be one of the major goals of the existing debate in France, will not affect article 2060 of the Civil Code and will not make valid the arbitration clause included in contracts signed between a non-professional, such as a consumer, and a professional. Here again, the hurdle would be overcome

127 *See* the Senate's Commission report mentioned under note n°2, p. 31.

128 Information Report by Mr. Laurent Béteille and Mr. Richard Yung, *op. cit.*, pp. 74-78.

129 The *Green Tree* US Supreme Court case provides an example of such a clause. The clause entered into by *Green Tree* with its customers indicated that disputes " *shall be resolved by one arbitrator selected by us [Green Tree] with consent of you[Green Tree's customer],* quoted by B. Hanotiau, *op. cit.* in note n° 4, p. 264.

by the execution of an arbitration agreement after the constitution of the group of claimants.

Accordingly it is not impossible that class actions arbitration "*à la française*" will someday exist. Yet, before thinking of class actions arbitration, in order to make class actions an attractive proposition, French law on civil liability should also be modified. For instance, it is a common practice for US Courts to allow punitive damages under a class action procedure.[130] Such practice has the advantage to avoid difficult problems of evidence in the allocation of damages and, above all, has a deterrent effect which prevents future abuses. However, by a decision dated December 1st, 2010, the French *Cour de cassation* ruled that punitive damages are contrary to public policy when they are disproportional to the damage suffered and with the breach of the contract.[131] So, the race is not run.....

130 J.P. Grandjean, « Class Actions » américaines et ordre public français », Les Echos n°20613 du 11 février 2010, p.13.

131 Cass. Civ. 1 re, December 1 st., 2010, claim n° 09-13303. Cour de cassation confirmed that :" *If the principle of a condemnation to punitive damages, is not, in itself, contrary to the public order, it is different when the amount granted is disproportional with respect to the damage suffered and the breaches of the contractual obligations of the debtor; in this case, the decision finds that the foreign decision has granted to the buyer, in addition to the repayment of the price of the ship and the amount of the reparation, an indemnity that largely exceeds this sum; the Court of appeals could deduce that the amount of the damages was obviously disproportional with respect to the damage suffered and the breach of the contractual obligations so much so that the foreign judgment could not be recognized in France*." Decision commented by David Motte-Suraniti, "Punitive Damages and Exequatur Under French Law", available on: www.motte-suraniti-avocat.com

Class Actions and Arbitration Procedures – Czech Republic

Alexander J. Bělohlávek

1. Concept of Class Actions in the Czech Republic and Elsewhere, and Overview of Relevant Rules

1.1. Concept of Class Actions and Approach by Czech Law

Class actions are one way of resolving situations in which certain legal relations (and the rights and obligations to which they give rise) affect a large circle of persons. By contrast, the protection afforded by courts under Czech law is strictly individualised, and the courts decide strictly on individual rights and obligations of specific persons, i.e. in individualised disputes. For this reason, it is difficult for Czech procedural law to accommodate the protection of collective rights beyond the framework of established/traditional concepts already recognised by procedural law (such as, e.g. collective ownership by a community of owners). From the procedural point of view, it is perfectly possible to have hundreds of identical claims pursued by each individual claimant in a separate action. However, this option is extremely wasteful and time-consuming, and in the ultimate analysis, results in a complete congestion of the courts. This also means that a certain degree of undesirable (in fact, clearly unlawful) behaviour is being tolerated.[132] This usually concerns consumer claims. Another specific trait of particularly consumer disputes is the fact that – even though the damage caused to each consumer individually is relatively minor – the damage in absolute figures may constitute large-scale damage (due to the large number of injured parties). The given business entity thus derives substantial competitive advantage from their unlawful conduct. Traditional procedural instruments fall short of what is needed to resolve these cases.

In Czech law, for instance, there exists the institution of a (open-ended) community of owners who may themselves have a single authorised representative.[133] Further,

[132] Palla, Tomáš, Potřeba hromadných žalob ve spotřebitelských sporech [translation – The Need for Class Action in Consumer Disputes], ePravo.cz, document reference No. 56.464, 2009, accessible in electronic form at http://www.epravo.cz/top/clanky/potreba-hromadnych-zalob-ve-spotrebitelskych-sporech-56464.html [last visited on January 16, 2012].

[133] *See* Section 91 of Act 99/1963, Code of Civil Procedure, as amended (in an approximate translation, cit.): "(1) If there is more than one claimant or respondent in the same matter, then each of them acts on their own behalf in proceedings. (2) However, where the case concerns common

it is also possible to merge previously separate cases so that they are heard in joint proceedings.[134] However, this always entails that all persons involved must be parties to the proceedings, with the full set of rights afforded to such parties. This is highly problematic in practice, as the parties to such proceedings usually have nothing in common, apart from their identical claims, so that it is very difficult (and often, for subjective reasons, altogether impossible) for them to reach a consensus. It is rare for Czech law firms to offer joint representation of various claimants who are brought together by a common interest, nor do other organisations offer such an approach. Unlike the situation in other countries, such a course of action is highly uncommon in the Czech Republic. While the law of the land does account for a certain modus operandi that may be said to correspond to class actions, "class actions" of this kind are all but absent in practice, and legal theory rarely addresses the issue. Speaking from the vantage point of the Czech Republic, the topic is certainly attractive under economic and theoretical aspects, but the legal practice is actually silent on class actions, which in reality are a fringe issue, and essentially marginalised.

Basically, the concept of class action does not apply in the Czech Republic, due to the high degree of individualisation of claims in litigation. If one wanted to make use of class actions on a relevant scale, one would have to consider other (alternative) procedural instruments that could be used in such cases. European continental law often looks to the American model of class actions as a model to which it may aspire. However, this model cannot be automatically transposed into Czech law, as it is frequently the source of deviations and discrepancies, and lends itself to the undesirable phenomenon of *forum shopping*.[135] At the same time, Czech procedural law contains very stringent rules for determining the forum (place of jurisdiction).

rights or obligations of the kind that necessarily entail that the judgment will refer to all parties on one side of the dispute, then acts of any of them also extend to the others. That being said, modifying or withdrawing motions, recognizing claims, or entering into settlements all require the consent of all parties on one side of the dispute."

134 *See* Section 112 of the Code of Civil Procedure (in an approximate translation, cit.): "(1) In the interest of efficiency, the court may merge several matters initiated before it to hear them in joint proceedings, provided that they concern the same facts or events, or the same parties. (2) If the motion for the initiation of proceedings refers to matters that are unfit for a merger of proceedings, or if the grounds for which certain matters were merged by the court no longer apply, the court may decide to set aside a given matter for separate hearings." See, for instance, Schulz, Jaroslav, Identifikace účastníků řízení v soudních sporech [title in translation – Identification of the Parties to Proceedings in Litigation], Právní rádce, Prague : Economia, 1997, Vol. 12, No. 5, pp. 40 et seq.; Bartoš, Aleš, Ještě k problematice ustanovení občanského soudního řádu [title in translation – Additional Notes on the Issue with Certain Provisions of the Code of Civil Procedure], Právní rádce, Prague: Economia, 1994, Vol. 6, No. 2, pp. 12 et seq.

135 Selucká, Markéta, Přístup ke spravedlnosti jako základní podmínky ochrany spotřebitele [title in translation – *Access to Justice as a Conditio Sine Qua Non of Consumer Protection*], Conference paper, Days of Law 2008, Brno: Masaryk University, an electronic version of the collected conference papers is available at www.law.muni.cz%2Fsborniky%2Fdp08%2Ffiles%2Fpdf%2Fobcan%2Fselucka.pdf&ei=XB4UT6r_LOHE4gT71dX-Aw&usg=AFQjCNGBICsqTbcCH_V9YledWhzUbkuIBw&cad=rja [last visited on January 16, 2012].

1.2. Definition of Class Action, Reflecting Czech Law

By the term "class action", one means an "action brought in the interests of a larger circle of persons with identical or similar claims, who are not, however, parties to the proceedings on the said claims, though they may profit from the outcome of the proceedings".[136] Conversely, a situation in which one person brings a claim against a larger number of persons based upon the same legal relation would not qualify as class action – for instance, to mention an example cited by legal theory, the claims of the public television/broadcasting company vis-à-vis viewers/listeners who are supposed to pay regular monthly license fees. Czech law does not allow for merging these claims into one "collective claim", but demands that each claim be individually determined and substantiated. The only conceivable notion of collective action is thus, e.g. the collective representation[137] of a group of participants/parties involved with the same shared interests (see the above-cited provision of Section 120 of the Code of Civil Procedure).

One may differentiate between three groups of class action:

- **Private (Class) Action**: The defining feature of such action is that the claimant has standing to sue and asserts rights of their own – whereas this assertion of the claimant's private rights may trigger effects for others who are not party to the proceedings;[138]

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136 Winterová, Alena, Hromadné žaloby (procesualistický pohled) [translation – Class Actions (a Processualist View], Bulletin advokacie, 2008, Vol. 18, No. 10, pp. 20 et seq.

137 In connection with "group interests" in labour-law relations, see, for instance, Schulz, Jaroslav, Zastupování zaměstnanců před soudem [title in translation – *Representation of Employees before Courts*], Právní rádce, Prague: Economia, 1999, No. 11, pp. 28 et seq.

138 *See* Section 83 and Section 159a of the Code of Civil Procedure (in an approximate translation, cit.):
Section 83 [Code of Civil Procedure] "(1) The initiation of a court procedure precludes other proceedings in the same matter before the court. (2) Actions a) for an injunction or for remedies in matters of the protection of rights that were infringed upon or endangered by acts of unfair competition, b) for an injunction in matters of the protection of consumer rights, c) in matters of a corporate transformation (where stipulated by special legal regulations), d) for the compensation of damage or the adjustment of the amount of counter-performance under the Takeover Bid or for a review of the counter-performance in a case of squeeze-out, e) in such other matters as set out in special legislation, also preclude other court proceedings against the same respondent on actions brought by other claimants raising the same claims that have arisen from the same conduct or state of affairs."
Section 159a [Code of Civil Procedure] "(1) Unless the law stipulates otherwise, the operative part of a non-appealable judgment is binding solely upon the parties to the given proceedings. (2) The operative part of a non-appealable judgment that ruled in matters listed in Section 83(2) is binding not only upon the parties to the proceedings, but also upon other persons who are entitled persons vis-à-vis the respondent on grounds of the same claims that have arisen from the same conduct or state of affairs. Special legal regulations shall stipulate in what other cases, and to what extent, the operative part of a non-appealable judgment shall be binding also upon persons other than the parties to the proceedings. (3) The operative part of a non-appealable judgment with rules on a person's personal status is binding upon everyone. (4) To the extent that the operative part of a non-appealable judgment is binding upon the parties to the proceedings (and, as the case may be, other persons), it is binding also upon all public authorities. (5) As soon as a matter

- **Action by Representation (Collective Action)**: Here, the claim is filed by a legal entity – usually an association (as narrowly defined in the law). Such action may be brought by consumer associations, which usually seek to obtain an injunction to prevent traders and suppliers from engaging in certain conduct;[139]

- **Public Class Action**: In this case, the objective is to protect a general or public interest, rather than the sum total (aggregate) of the individual rights of private-law entities. Such an action would customarily be brought by governmental or public bodies, such as an ombudsman, the public prosecutor's office, etc. Czech law currently does not recognise this type of class action, though there are proposals to introduce the concept of public action by public prosecutors in the future, for the purpose of recovering unjust enrichment.[140]

1.3. Overview of Applicable Laws

The issue at hand must primarily be reviewed from the aspect of general civil-law rules of procedure, i.e. in particular, the Code of Civil Procedure, but also certain substantive-law rules, i.e. in particular, the Commercial Code, the Civil Code, the Consumer Protection Act, and the Transformations Act, among others. Within the context of what laws and regulations are applicable, it is especially pertinent to stress

has been decided in a non-appealable decision, that matter may not be heard again, to the extent to which the operative part of the judgment is binding upon the parties (and, as the case may be, other persons)."

139 *See* Section 25 (2) of the Czech Consumer Protection Act (Act 634/1992, as amended). Section 25 [of the Consumer Protection Act] (in an approximate translation, cit.): "(1) *The legal standing of consumer associations and of other legal entities formed for consumer protection purposes ("associations") is governed by special laws* [author's note: these primarily being Act 83/1990, on citizen associations, as well as the general rules for forming associations set out in the Civil Code, i.e. Act 40/1964, as amended]. (2) *Persons who may file action for an injunction in matters of the protection of consumer rights, and who may act as party in the pertinent proceedings, may be a) an association or organisation with legitimate interest in the protection of consumers, or b) an entity from the list of entities authorised to file action for an injunction in the area of protecting consumer rights (the "list of qualified entities"), without prejudice to the court's right of review of whether the action was filed by a qualified entity.* (3) *The list of qualified entities is maintained by the Commission of the European Communities and published in the Official Journal of the European Union* [in the terms of Directive of the European Parliament and of the Council 98/27/EC, on injunctions for the protection of consumers' interests]. (4) *An association may be nominated for inclusion on the list of qualified entities on behalf of the Czech Republic if* a) *it was established pursuant to Czech law,* b) *has been active in the area of consumer protection for at least two years,* c) *is an independent non-profit organization, and* d) *has no outstanding financial obligations vis-à-vis the Czech Republic.* (5) *The association shall submit its request for being included on the list to the Ministry of Industry and Trade, along with documentary proof of the fulfillment of the requirements set out in paragraph (4). Provided that the association meets the stipulated requirements, the Ministry of Industry and Trade shall propose to the Commission of the European Communities that the association be included on the list of qualified entities.*"

140 Selucká, Markéta, Přístup ke spravedlnosti jako základní podmínky ochrany spotřebitele [title in translation – *Access to Justice as a Conditio Sine Qua Non of Consumer Protection*], Conference paper, Days of Law 2008, Brno: Masaryk University, an electronic version of the collected conference papers is available at www.law.muni.cz%2Fsborniky%2Fdp08%2Ffiles%2Fpdf%2Fobcan%2Fselucka.pdf&ei=XB4UT6r_LOHE4gT71dX-Aw&usg=AFQjCNGBICsqTbcCH_V9YledWhzUbkuIBw&cad=rja [last visited on January 16, 2012].

that the issue of class actions is closely related to such issues as the forum (place of jurisdiction), the effects of the initiation of proceedings, and the effects of decisions handed down in the given case. Czech law is principally built upon a continental understanding of civil law, which understands jurisdiction (along with the other institutions mentioned above) to be solely issues of procedural law (procedural requirements for hearing and deciding a case). This is why substantive-law provisions may be considered to be of a rather subsidiary nature. In connection with arbitration procedures, we primarily ought to mention the Czech *lex arbitri*, which is embodied in Act 216/1994, on arbitration and on the enforcement of arbitral awards, which has in fact been recently rather substantially amended.[141]

2. Typical Elements of Class Action in Czech Domestic Law (Litigation)

2.1. Current Legal Framework

Czech procedural law contains no special rules for class actions. Individual aspects of the issue of raising collective claims are addressed by Sections 86[142] and 159a[143] of the Code of Civil Procedure. Section 83(2)(a) and (b) of the Code of Civil Procedure[144] stipulates that the initiation of proceedings for an injunction or remedy in matters of the protection of rights infringed upon or endangered by unfair competition, or the initiation of proceedings for an injunction in matters of the protection of consumer rights also precludes other litigation against the same respondent in matters of action filed by other claimants who raise the same claims on grounds of the same kind of conduct (or the same state of affairs).[145] In other words, in such cases, the cited provision creates the obstacle of *litispendence*. Section 159a (2) stipulates that the operative part of a non-appealable judgment on the kind of matters referenced in

141 By way of the amendment to the Arbitration Act that came into force on April 1, 2012 (and which will be discussed in more detail below, along with the concept of the Arbitration Act).

142 Section 86 of the Code of Civil Procedure (in an approximate translation, cit.): "(1) If a respondent who is a Czech citizen has no place of general jurisdiction, or if their place of general jurisdiction lies outside the Czech Republic, then the competent court for hearing the case is that court in whose district the said respondent had their last established place of residence in the Czech Republic. (2) Property rights may be enforced vis-à-vis those who have no other place of jurisdiction in the Czech Republic in that court in whose district they have their property. (3) A claim (motion for the initiation of proceedings) may be filed against foreign persons inter alia in that court in whose district they have operating premises, or a branch office of their foreign enterprise, in the Czech Republic."

143 Cited in a footnote above (in an approximate translation).

144 Cited in a footnote above (in an approximate translation).

145 For a conflict-of-laws perspective, see among the Czech literature, e.g. Valdhans, Jiří, Právní úprava mimosmluvních závazků s mezinárodním prvkem [title in translation – *Conflict-of-laws Rules for Torts with an International Dimension*], Prague: C. H. Beck, 2012, Chapter 4.4.8.1; Bělohlávek, Alexander, Rome Convention / Rome I Regulation, Commentary, Huntington (New York): Juris-Publishing, 2010, Part I & II (and here, in particular, the commentary on Article 6 of Rome I); this publication is also available in Czech (2009), Polish (2010), Romanian (2012), and Russian (2010), among others.

Section 83(2) is binding not only upon the parties to the proceedings, but also upon other persons who are "entitled persons" or beneficiaries vis-à-vis the respondent on grounds of the same claims (brought about by the same conduct of the respondent, or the same state of affairs). Hearing a similar action against the respondent for the same claims brought about by the same conduct or state of affairs is precluded by the obstacle of *rei judicatae*. Originally, this provision, which is of an exclusively procedural character, was incorporated into the Commercial Code and concerned protection against unfair competition. Effective as of January 1, 2003, it became a part of the Code of Civil Procedure, and it now concerns, aside from protection against unfair competition (for which it was originally conceived), also other claims (and other procedures), i.e. in particular, the protection of consumer rights, the transformation of companies (particularly those with a larger number of members/shareholders), and other matters (procedures) as set out in special legislation.

2.2. Abstaining from Unlawful Conduct / Remedying Defective State of Affairs (Section 83 of the Code of Procedure)

The cases governed by Section 83(2)(a) and (b) of the Code of Civil Procedure[146] concern the abstention from unlawful conduct or, as the case may be, remediation of a defective state of affairs. If it is found, upon reviewing the prerequisites for initiating proceedings (procedural requirements), that another procedure is pending against the same respondent, in which claimants seek the satisfaction of the same kind of claim based upon the same conduct or state of affairs, then the procedure will be set aside without a decision on the merits; this situation is said to create the obstacle of *litispendence*.

Generally, for the obstacle of litispendence to arise, it is necessary for the subject matter to be identical – defined as, firstly, the same identity of the parties – both the claimant and the respondent (including, however, their legal successors, if any) – and secondly, the same identity of the matter to be heard by the court (which is deemed given if the relief sought and the grounds for the claim are the same).

Section 83(2) of the Code of Civil Procedure expands the term *litispendence*, such that in those matters referenced in the cited provision, the identity of the claimant need not be preserved for the obstacle to arise (i.e. it applies to any other, if only potential, claimant). However, the identity of the respondent and the identity of the subject matter of the dispute must be preserved. Given that these requirements are of a strictly and exclusively procedural nature in the understanding of Czech law, the court is required to review them *ex officio* (even without any motion or request by any party). The court itself must, upon seeing that another action has been filed, determine whether the identity of the respondent has been preserved and whether the same claim has been raised, based upon the same conduct or state of affairs.

146 Cited in a footnote above (in an approximate translation).

Litispendence in the terms of Section 83(2)(a) of the Code of Civil Procedure is given in matters of the protection of rights infringed upon or endangered by **unfair competition**,[147] in those cases in which other persons whose rights were violated or endangered by the same acts of unfair competition seek an injunction against the same respondent regarding the same unlawful conduct (or remedies regarding the same defective state of affairs) as sought by another person (other claimant) in earlier proceedings. A legal entity whose scope of activities includes the protection of interests of competitors or consumers also has standing to sue.[148]

According to Section 83(2)(b) of the Code of Civil Procedure, *litispendence* arises (and the obstacle of *litispendence* occurs) in matters of **the protection of consumer rights**, if other persons seek an injunction against the same respondent[149] as sought by another party with standing in a previously initiated procedure. The party with standing, in this case, may be a legal entity that has come into existence pursuant to Act 83/1990, on citizen associations, as amended, and whose mission, according to the charter thereof, is to protect the rights of consumers, or a legal entity entered on the list of entities qualified to bring action for an injunction in the area of the protection of consumer rights.[150] The list of qualified entities is maintained by the EU Commission and published in the Official Journal of the EU.

Another pertinent case is that of a **transformation of a trading company or co-operative**. Companies or co-operatives may be transformed[151] by way of a merger, de-merger, transfer of assets to the shareholder, or change in legal form. Mergers, in turn, may take the form of a domestic merger or a cross-border merger, and be consummated in the form of amalgamation or absorption. De-mergers may take the form of (▪) a de-merger involving the establishment of new companies or co-operatives, (▪) a de-merger followed by consolidation, (▪) a combination of a de-merger involving the establishment of a new company or co-operative and a de-merger followed by consolidation or a de-merger by spin-off (which in turn could be a de-merger by spin-off involving the establishment of a new company or new co-operative or a merger by spin-off followed by consolidation, or (▪) a combination of a de-merger by spin-off involving the establishment of a new company or co-operative and a de-merger by spin-off followed by consolidation. A "transfer of assets to the shareholder" means that the partners/shareholders of a company or, as the case may be, the competent body of the company decides to wind the company up without liquidation and that the assets of the company (including the rights and obligations from labour-law relationships) are to be taken over by one

147 Section 53 and Section 54 of the Czech Commercial Code (Act 513/1991, as amended).
148 Section 54(1) of the Commercial Code.
149 i.e. a breach of the obligations that have been imposed on the businessperson in favor of the consumer with respect to sales of goods and the provision of services by, in particular, the Consumer Protection Act (Act 634/1992, as amended) and by Sections 52 to 65 incl. of the Civil Code (Act 40/1964, as amended).
150 Section 25(2) of the Consumer Protection Act (cited in an approximate translation further above).
151 Pursuant to the Transformations Act, (Act 125/2008).

shareholder – transferee. A change in legal form does not result in the dissolution of the respective legal entity, nor do their assets pass unto a legal successor, but merely in a change of the legal entity's internal legal affairs and of the legal standing of its members. The obstacle of *litispendence* applies in matters of corporate transformations[152] if a law so stipulates;[153] this is the case, e.g. for actions for the nullification of such transformations.[154]

Anyone who fails to make a takeover bid within the statutory time period[155] in spite of having incurred the obligation to make a bid under the law must compensate the owners of equity securities for the damage that they incurred as of the last day of the time period for the discharge of the obligation to bid.[156] If any of the beneficiaries of this arrangement brings action for the said compensation for damages, the court publishes a notice on the initiation of proceedings on its bulletin board, and notifies the Czech National Bank. Other persons with standing may then bring action for damages within three months from the day on which the said notice was put on the court's bulletin board. Additional lawsuits after this time period has lapsed are precluded by the obstacle of *litispendence*.[157] The same applies, with the necessary modifications, to a claim in court for damages incurred due to the fact that the takeover bid contained false or incomplete information.[158]

152 Pursuant to Section 83(2)(c) of the Code of Civil Procedure (cited in an approximate translation further above).

153 The Transformations Act (Act 125/2008).

154 Section 52 et seq. of the Transformations Act (Act 125/2008)

155 Pursuant to the Takeover Bid Act (Act 104/2008, as amended).

156 Section 50 of the Takeover Bid Act (Act 104/2008, as amended). The provision in question reads (in an approximate translation, cit.): "[Claim on grounds of non-compliance with the obligation to make a bid] (1) *If an offeror who has become obliged to make a takeover bid fails to do so within the statutory term, then those persons who hold equity securities as of the last day of the time period for fulfilling the obligation to make a bid may file a claim for damages. In the case of bearer shares, it is held that the person who is their owner as of the day on which the claim is filed meets the criterion pursuant to the first sentence.* (2) *The claim pursuant to paragraph (1) may be filed (a) no later than within 6 months from the lapse of the period for complying with the obligation to make a bid, or b) if the offeror failed to meet the requirement to publicly announce the obligation to make a bid, within 6 months from the day on which the claimant learned of the incurrence of the obligation to make a bid.* (3) *If proceedings are initiated on the basis of a claim pursuant to paragraph (1), then the court shall give public notice thereof on the court's bulleting board and notify the Czech National Bank. Other persons who have become entitled in the sense of paragraph (1) may in such a case file a claim pursuant to paragraph (1) within 3 months from the day on which the notice was put on the bulletin board pursuant to the first sentence; they may do so even if the time periods pursuant to paragraph (2) have run out without a claim having been made.* (4) *The court decision wherein claimants are awarded a right for damages pursuant to paragraph (1) is binding upon the offeror, in terms of the underlying grounds, also vis-à-vis all other persons who seek compensation for the damages caused by the breach of the obligation to make a bid.*"

157 Pursuant to Section 83 (2) (d) of the Code of Civil Procedure (cited in an approximate translation hereinabove).

158 Section 51 of the Takeover Bid Act (Act 104/2008, as amended). See, for instance, Ossendorf, Vít, Civilní odpovědnost za nesprávné a neúplné informace na finančním trhu [translation – Civil-law Liability for Inaccurate or Incomplete Information on the Financial Market], Jurisprudence, 2009, No. 4, pp. 16 et seq.

The obstacle of *litispendence*[159] is also created by the initiation of proceedings due to a claim in which the addressee of the takeover bid seeks payment of the difference between the counter-performance offered in the takeover bid and the counter-performance that the offeror should have actually rendered (court-ordered adjustment of the counter-performance).[160]

As from the moment at which the owners of equity securities receive the invitation to the general meeting of a joint-stock company that is to decide on a squeeze-out proposal by the main shareholder (or as of the moment at which such general meeting has been announced), these minority shareholders may ask that the adequacy of counter-performance be reviewed by a court.[161] The initiation of a procedure based on such action filed by one of the owners of equity securities creates the obstacle of *litispendence*[162] for hearing future actions by other shareholders.

Litispendence in the terms of the Code of Civil Procedure[163] may also be given in cases other than those enumerated above, if special laws so stipulate. This is the case, e.g. for the rules governing **public auctions:**[164] if an action is brought for the nullification of a public (voluntary or forced) auction, another procedure against the same respondent(s) based on an action by other claimants who seek nullification of the same public auction is precluded if those other claimants bring an action on

159 In the terms of Section 83(2)(d) of the Code of Civil Procedure (cited in an approximate translation hereinabove).

160 Section 52 of the Takeover Bid Act (Act 104/2008, as amended).

161 Section 183k of the Commercial Code (in an approximate translation, cit.): "(1) The owners of equity securities may, as of the moment at which they receive the invitation to the general meeting (or, as the case may be, as of the moment at which the general meeting has been announced), ask the court to review the adequacy of the counter-performance; this right expires if it is not exercised within one month from the day on which the entry of the general meeting's resolution into the Commercial Register has been made public in the sense of Section 183l. (2) If the owner of equity securities does not make use of their right set out in paragraph (1), they may not invoke the inadequacy of counter-performance at any later time. (3) The court decision in which the court awards a right for counter-performance in a different amount is binding upon the main shareholder and the company in terms of the underlying grounds also with respect to all other owners of equity securities. The limitation period begins as of the day on which the decision becomes final vis-à-vis all beneficiaries (irrespective of whether they were parties to the proceedings). (4) If the amount of counter-performance is determined to be inadequate, then this does not cause the resolution of the general meeting to be null and void in the terms of Section 183i (1). (5) It is not possible to base a motion for nullification of resolutions of the general meeting pursuant to Section 131 on the purported inadequacy of counter-performance." See, for instance, Tryzna, Jan, Usnesení Nejvyššího soudu sp. zn. 29 Cdo 4712/2007 [title in translation – Supreme Court Resolution 29 Cdo 4712/2007], Jurisprudence, Prague, 2010, No. 4, pp. 41 et seq., or Bartl, Marija, Ústavní aspekty české regulace squeeze-outu [title in translation – Constitutional-law Aspects of the Czech Regulation of Squeeze-outs], Konkursní noviny, Prague, 2008, No. 3, pp. 8 et seq.

162 Pursuant to Section 83 (2) (d) of the Code of Civil Procedure (cited in an approximate translation hereinabove).

163 Section 83(2) of the Code of Civil Procedure (cited in an approximate translation hereinabove).

164 Section 24 and 48 of the Public Auctions Act (Act 26/2000, as amended). The case law on the issue of jurisdiction over hearing declaratory actions seeking the nullification of public auctions has been annotated, e.g. in Právní fórum, Prague: Wolters Kluwer CZ, 2006, No. 7, pp. 104 et seq.

the same [factual and legal] grounds as the claimant in whose favour the earlier proceedings were initiated.[165]

A problem may occur in applying the obstacle of *litispendence* in the terms of Section 83 (2) of the Code of Civil Procedure if **the claims raised are essentially identical, but broader in one case and more narrow in the other** (for instance, one claimant merely seeks an injunction barring the adversary from engaging in unlawful conduct, but the other claimant seeks, in addition to that, remedies to remove the defective state of affairs). It also may be the case that claimants seek adequate reparation or damages, or the surrender of unjust enrichment – forms of relief that are no longer covered by the said procedural obstacles. When assessing such scenarios, one needs to realise that procedural law always allows, among other things, for setting aside a procedure only in part. Therefore, if the claim raised by the future additional claimant is broader, the court ought to merge both proceedings, and if necessary, set aside proceedings only with respect to that part of the action that seeks an injunction or the imposition of remedies.

Also, future claimants must not be barred from seeking adequate reparation or damages in a separate action. In such a case, the non-appealable judgment on the injunction or the obligation to provide remedies that is handed down in the first claimant's dispute would represent a prejudicial issue that has been resolved with binding power also for this later action brought by the other claimant.

Regarding the obstacle of *litispendence* (i.e. a procedure initiated based upon an earlier action that is still pending), one may ask oneself what procedural remedies are available to future parties whose identical action is being set aside. Pursuant to Section 93 of the Code of Civil Procedure, such a party (competitor or consumer) may enter into the earlier procedure as a **secondary party** and accede to the claimant's action. Their legal interest in the result of the procedure (which is a prerequisite for persons who wish to enter proceedings as a secondary party) could hardly be called into doubt. However, this is not the only feasible solution:

These persons could also accede to proceedings as an **additional party**,[166] a solution that is even more favourable to them, in that they then have all procedural rights, including the filing of any kind of remedy available in the given matter. However,

165 Drápal, Ljubomír, and Bureš, Jaroslav, Občanský soudní řád I. [translation – *Code of Civil Procedure I*], 1st ed., Prague: C. H. Beck, 2009, pp. 549 et seq.

166 Pursuant to Section 92 (1) of the Code of Civil Procedure (in an approximate translation, cit.): "(1) Upon the claimant's request, the court may allow that another party accede to the proceedings. If the person who is thus to accede to the proceedings is supposed to do so on the side of the claimant, then their consent is required. (2) Upon the claimant's request and with the consent of the defendant, the court may allow that the claimant or the defendant leave the proceedings and that someone else enter the proceedings in their stead. If this change is to occur on the side of the claimant, then the person who is to enter proceedings in the claimant's stead must give their consent. [...]."

accession as an additional party to the proceedings[167] is conditional upon a request or motion to that effect by the (original) claimant, who only in exceptional cases will be motivated to allow such a "merger of cases". While not ruled out by the law, this approach is rare in practice, and found in individual cases of a peculiar character, rather than in situations which one would typically associate with "class actions".

The accession of an additional party to the proceedings is also possible in those cases in which the action was brought by a legal entity qualified to protect the interests of competitors or consumers.[168] Even so, intervention as a secondary party remains the more accessible option for persons whose claim was set aside due to the obstacle of litispendence. This is because they merely have to *notify* the court of their accession to proceedings, i.e. they do not file a statement of claim of their own. The court takes note of the fact, and only reviews (and decides upon) the accession if any of the original parties has objections. That being said, the position of a secondary party in proceedings is not equal to full standing (for instance, they cannot appeal on a point of law/seek court review, seeing as this form of appeal ["*dovolání*" in Czech] is an extraordinary remedy).

2.3. Effects of *Res Judicata* on Third Parties (Section 159a (2) of Code of Civil Procedure)

Pursuant to Section 159a (2) of the Code of Civil Procedure,[169] the operative part of a non-appealable court judgment on a class action is **binding not only upon the parties to the proceedings** (i.e. the claimant and the respondent), but also upon other persons who are in the position of an entitled person, or beneficiary, vis-à-vis the respondent, on grounds of the same claims that have arisen from the same conduct or state of affairs. In addition, special law may stipulate that there are other cases in which such a decision is binding upon persons other than the parties to the proceedings, and to what extent.[170] In line with this particular provision of the Code of Civil Procedure, (court) judgments handed down in a procedure with a single claimant may have to be extended to all other persons who have a substantive-law right towards the respondent – i.e. who are members of a certain specific group in whose favour the court ruled.

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167 Pursuant to Section 92(1) of the Code of Civil Procedure. See also, for instance, Svobodová, Ilona, Přistoupení a záměna podle občanského soudního řádu [translation – *Accession to Proceedings and Change of Participants under the Code of Civil Procedure*], Právní praxe, Prague, 1995, No. 10, pp. 644 et seq.

168 As is made possible by Section 544(1) of the Commercial Code and Section 25(2) of the Consumer Protection Act (Act 634/1992, as amended).

169 Cited in an approximate translation further above.

170 Smolík, Petr, Hromadné žaloby – současnost a výhledy české právní úpravy [title in translation – Class Actions – *The Czech Legal Framework Today and Its Future Perspectives*], Právní fórum, Prague: Wolters Kluwer, 2006, No. 11, pp. 395 et seq.

Regarding the obstacle of *rei judicatae*,[171] **the fact that the judgment on an earlier action may well dismiss that action may represent a problem:** judgments that accommodate the claimant and judgments that dismiss the action are equally obstacles to further proceedings in the same matter. This would appear to mean that future claimants have no legal avenue, not only to obtain an injunction or a judgment imposing remedies, but also to file an action for reparation or damages, without ever having had the opportunity to take a position on the matter. For this reason, legal doctrine in the Czech Republic has assumed a sceptical attitude vis-à-vis class actions and similar kinds of procedural associations and collectives of claimants, under the aspect of, inter alia, the right to due process. At this point, we need to mention that Czech procedural law knows cases of decisions of dismissal that do not preclude a new hearing – namely, a form of decision known as decision specific to the circumstances (such as the dismissal of an action due to early filing), or the dismissal of an action on grounds solely attributable to a specific individual claimant. These cases presuppose that the reason for dismissal is precisely defined in the explanation of the judgment, and that the judge who is to review an action that was filed later will carefully look into the reasons for the earlier judgment of dismissal before deciding on whether to set aside the proceedings.

2.4. Shortcomings of Czech Legal Framework concerning enforceability of class actions as a legal institution

The institution of class action is usually tied to the concept of **collective reparation**, which **Czech law forbids, at least in this form**. The provisions of Czech law cited earlier above do govern claims that exhibit certain **elements of class action**, but in practice they do not lead to the desired effect of collective compensation for the injured parties, which is why, **in connection with Czech law, there can be no talk of a class action concept in the true sense of the term.** Above all, we need to point out that Section 83(2)(a) and (b) of the Code of Civil Procedure **speak exclusively of actions designed to ensure freedom from interference** (*actio negatoria*). While it is possible to think of situations in which the consumer themselves may bring action against the business over the infringement of their rights within the legal framework established by these provisions (*private/class action*), these rules typically address cases in which a consumer rights organisation takes a business to court [**solely**] **in order to seek an injunction preventing them from engaging in unlawful conduct** damaging to the rights of consumers (action by representation/collective action).

A decision in such a matter is then also binding for any similar action in which the same claims are raised against the same respondent over the same conduct or state of affairs. These usually constitute what is known as *action by representation*, within

[171] Pursuant to Section 159a (2) of the Code of Civil Procedure (this provision is cited in an approximate translation hereinabove).

the context of which the interests of consumers are enforced by a consumer association (consumer rights organisation), which has the right to represent consumers under special law.[172] The trouble with this legal arrangement is that businesses often cause (in aggregate) large-scale damage to consumers, even though the damage on the level of the individual consumer is relatively negligible. **Consumer rights organisations may only bring actions for injunction, but not for damages (i.e. they may not seek an award of compensation for individual consumers)**. The latter therefore must file their own separate claims against the given business, seeking compensation for damages. Usually, consumers will hold out, though, waiting to see the ruling on the dispute between the consumer organisation and the sued business before they decide, based on the outcome of the former, whether or not to file a claim for damages. It needs to be said that this strategy is often in conflict with the requirement of procedural economy.[173]

2.5. Differences between Czech Law and [Typical] Models of Class Action

In the Czech Republic, the first claimant (i.e. that claimant which was the first to bring an action against a given respondent) has no legal responsibility in terms of compliance with proper procedure (due process) vis-à-vis other claimants whose actions will be set aside (on grounds of the obstacle of *litispendence*) or vis-à-vis persons who are not party to the proceedings, but upon whom the court ruling in the given matter is binding. Also, Czech law provides no safeguards for situations in which the first claimant and the respondent settle, or in which the first claimant engages in nefarious behaviour; while numerous other jurisdictions require that the withdrawal of action and settlements be approved by the court, Czech law does not, and in this sense has no *rules for protecting affected persons* who are not party to proceedings. Also, there are no criteria for determining whether a given claim qualifies as a class action – as the courts do not award the official status of class action to claims filed with them. In contrast to foreign models, neither the court nor the parties **are in any way required under Czech law to notify the general public** of the initiation of proceedings or of the results of a dispute. We may therefore say that, in reality, **class action as a legal institution does not exist in the Czech Republic**, but merely specific rules for *litispendence* and *rei judicatae*,[174] which as to their consequences (and even then only in certain aspects) approximate elements of a [typical] class action.

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172 *See* Section 25 of the Consumer Protection Act (Act 634/1992).

173 Palla, Tomáš, Potřeba hromadných žalob ve spotřebitelských sporech [translation – *The Need for Class Action in Consumer Disputes*], ePravo.cz, Prague, document reference No. 56.464, 2009, accessible in electronic form at http://www.epravo.cz/top/clanky/potreba-hromadnych-zalob-ve-spotrebitelskych-sporech-56464.html [last visited on January 16, 2012].

174 David, Ludvík et al, Občanský soudní řád. Komentář, I. díl. [title in translation – *Commentary on the Code of Civil Procedure, Part I*], Prague: Wolters Kluwer ČR, 2009, pp. 393 et seq.
Zima, Petr, Skupinové žaloby a české právo [title in translation – *Class Actions and Czech Law*], Právní fórum, Prague: Wolters Kluwer, 2007, No. 3, pp. 94 et seq.

2.6. Final Observations regarding Czech Attitude towards Institution of Class Actions

Czech law currently contains no comprehensive (or even sufficient) rules to address the concept of class action. It merely contains isolated provisions governing certain partial aspects of class action, such as Section 83 or Section 159a of the Code of Civil Procedure,[175] which, however, are markedly different from classic class actions in the understanding of Anglo-Saxon law. The abovementioned provisions merely stipulate the obstacle of *litispendence* and *res judicata* for cases in which claims are made vis-à-vis the same respondent based on the same legal situation or the same conduct by the respondent. The main difference here is that Czech law does not protect those who are also affected by the court decision, but who had no say in the proceedings on the matter. This is caused by the absence of any criteria that would allow one to call a given lawsuit a class action, and by the fact that neither the parties to a dispute nor the courts have any disclosure duties vis-à-vis the general public. It is only fair to mention that the issue has been discussed only marginally in professional circles. After all, any legal institution represents a trade-off between advantages and drawbacks. While class actions certainly provide a number of benefits, both to the persons immediately affected and in the general economic terms of *healthy market development*, neither the lawmaker nor the market in the Czech Republic have so far seen the need to initiate a discussion on the topic; the sporadic discussions of class actions that do exist mostly play out within academic circles.[176]

3. Arbitration

3.1. Legal Framework for Arbitration in Czech Republic

Arbitration in the Czech Republic looks back on a tradition of many decades. It is regulated in a separate law on arbitration procedures (the "Arbitration Act") from 1994,[177] which replaced an earlier law dating from 1967. At the end of 2011, an extensive amendment to the Arbitration Act was passed (which came into force on April 1, 2012), following lengthy discussions.[178] The main objective of the said amendment was to provide rules for arbitration in consumer disputes (i.e. disputes arising from contracts made with consumers), which in the Czech Republic have

[175] Both provisions of the Code of Civil Procedure have been cited in an approximate translation hereinabove.

[176] See, for instance, Winterová, Alena, Procesní důsledky skupinové žaloby v českém právu [translation – *The Procedural Consequences of Class Actions in Czech Law*], in: Pocta Jiřímu Švestkovi [translation – *Liber Amicorum for Jiří Švestka*], Prague: ASPI, 2005.

[177] Act 216/1994, on arbitration and on the enforcement of arbitral awards, as amended (the "Arbitration Act").

[178] Act 19/2012 (the "Amendment to the Arbitration Act").

been[179] (and remain after the said amendment) arbitrable. The wording of the Arbitration Act in force until March 31, 2012 contained no special rules for arbitration procedures in B2C disputes – this resulted in, among other things, disputes over the very arbitrability of consumer contracts and over the fairness of arbitration clauses in consumer contracts, with a particular view on Directive of the Council No. 93/13/EEC of April 5, 1993, on unfair terms in consumer contracts,[180] and to the Czech substantive law on the protection of consumers.[181] Until now, the interpretation under Czech *lex arbitri* was based on the "*competence-competence*" principle.[182] The rather substantial case law of Czech [general] courts and of Czech Constitutional Courts has often returned to the issue,[183] and – in spite of a certain ambiguity and the occasional lack of consistency – repeatedly assumed the position that arbitration clauses in consumer contracts are principally acceptable, and that consumer disputes therefore *are* arbitrable.[184] When it came to the review of specific contracts and specific disputes, ambiguity crept in with respect to whether or not the terms in those contracts should be considered fair. Given the great number of disputes heard in arbitration in the Czech Republic, the matter has delicate political connotations. Domestic arbitral awards require no separate proceedings on enforceability,[185] and upon service (i.e. upon becoming final and non-appealable) directly form the basis

179 Slováček, David, Rozhodčí řízení a směrnice o nepřiměřených podmínkách ve spotřebitelských smlouvách [title in translation – *Arbitration and the Directive on Unfair Terms in Consumer Contracts*], Právní rozhledy, Prague : C. H. Beck, 2010, No. 9, pp. 331-334; Bělohlávek, Alexander, Rozhodčí řízení v tzv. smlouvách (vztazích) spotřebitelského typu [title in translation – *Arbitration in B2C Relations*], Právní fórum, Prague : Wolters Kluwer, 2010, No. 3, pp. 89-99.

180 *Official Journal*, L 95 of April 21, 1993, pp. 29–34. CELEX: 31993L0013.

181 For details, see e.g. Bělohlávek, Alexander, Rome Convention / Rome I Regulation, Commentary, Huntington (New York): JurisPublishing, 2010, Vol. I & II (and here, in particular, the commentary on Article 6 of Rome I); this publication is also available in Czech (2009), Polish (2010), Romanian (2012), and Russian (2010).

182 *See* Rozehnalová, Naděžda, Zásada autonomie a zásada rozhodování rozhodců o své pravomoci – dvě stránky jednoho problému [title in translation – *The Autonomy Principle and the Competence-Competence Principle – Two Sides of the Same Coin*], Časopis pro právní vědu a praxi, Brno: Masaryk University, 2008, No. 2, pp. 112–121.

183 For an in-depth analysis of the case law, see e.g. Bělohlávek, Alexander, Ochrana spotřebitelů v rozhodčím řízení [title in translation – *Consumer Protection in Arbitration*], Prague: C. H. Beck, 2012, marg. No. 371 et seq. (currently published in Czech, with English, Polish, Romanian, and Russian editions slated for publication); the Czech judicature is also annotated in: Bělohlávek, Alexander and Rozehnalová, Naděžda. CYArb – Czech (& Central European) Yearbook of Arbitration, Huntington: JurisNet, 2011, Vol. 1 and Bělohlávek, Alexander and Rozehnalová, Naděžda. CYArb – Czech (& Central European) Yearbook of Arbitration, Huntington: JurisNet, 2012, Vol. 2 (chapter "Judicature"), among others.

184 It used to be the case that lower-instance courts considered arbitration clauses to be null and void *ex lege*, without taking into consideration the individual circumstances of the given case; only in appellate proceedings or in review proceedings on an appeal on a point of law before the Czech Supreme Court were their decisions amended. By contrast, the Czech Supreme Court usually (at least on a general level) does not find arbitration clauses to be at odds with consumer protection legislation (see, for instance, Supreme Court resolution 32 Cdo 1590/2008, of March 30, 2009). This complex of issues has also been frequently addressed by the Czech Constitutional Court).

185 This concept is similar to that of Austrian law. However, Austrian law takes a restrictive stance on the arbitrability of consumer disputes, and essentially rules out arbitration clauses in B2C disputes (see our separate excursion into Austrian law).

for the enforcement of the decision, based merely upon a [straightforward] court order, which is why there exist no exact statistics on the number of cases heard in the Czech Republic. That being said, the estimate for recent years is that **approximately 150,000 arbitral awards are handed down every year** in the Czech Republic alone (most of them in *ad hoc* procedures in consumer disputes). If only for this reason, the debate over the amendment bill to the Arbitration Act was extensive, and at times marked by strong political influence. According to Section 2(1) of the Arbitration Act [CZE], **all property disputes in which an amicable settlement is admissible may be resolved in arbitration, with the exception of disputes in connection with the enforcement of a decision, and the exception of incidental action**.[186] In reviewing the arbitrability of a private-law dispute, then, Czech law does not take into account the status and nature of the contractual parties (i.e. the parties in dispute),[187] and therefore contains no specific criteria for contracts in which one of the parties is a consumer. Until the Amendment to the Arbitration Act, Czech law contained no explicit exemption whatsoever when it came to the arbitrability of consumer disputes. Under these circumstances, only the substantive-law protection of consumers from disproportional (unfair) contractual terms provided some interpretational leeway with respect to the validity and applicability of arbitration clauses in consumer contracts. In any case, resolving this kind of dispute in arbitration was principally not precluded, nor is it today.

3.2. Amendment to Arbitration Act as of April 1, 2012; Consumer Protection in Czech Lex Arbitri

The Amendment to the Arbitration Act, which comes into force as of April 1, 2012, preserves the current scope of the Arbitration Act (including the arbitrability of disputes – which has in fact even been somewhat expanded). Consumer disputes (B2C disputes) continue to be arbitrable, although special conditions, which are now explicitly laid down in the law, must be observed. A similar approach with respect to consumer disputes to that in the Amendment to the Arbitration Act can be found, e.g. in German law, from which the Czech concept of *lex arbitri* takes its bearings. At the same time, the Amendment to the Arbitration Act reflects certain aspects expressed in the *Commission Recommendation (EC)* 98/257/EC.

In particular, the new legal framework for arbitration in the Czech Republic (effective as of April 1, 2012, i.e. the day on which the Amendment to the Arbitration Act comes into force) expressly introduces the following **new elements of consumer protection (in the case of arbitration agreements made by a consumer)**:

186 Disputes on the scope of (i.e. on what assets should be included in, or be removed from) the insolvency estate.

187 With a single exception: that of disputes arising from contracts made by a public non-profit healthcare facility established pursuant to special law. According to Section 1(2) of the Arbitration Act, this particular type of dispute is not fit for arbitration.

- The arbitration agreement must be contained in a separate deed, apart from the document that governs other rights and obligations of the parties, i.e. apart from the "*main contract*" (sanctionable with irremediable nullity of such arbitration agreement).[188]
- The minimum obligatory content of such arbitration agreements is being defined.
- The requirements for arbitrators in consumer disputes have become more stringent (e.g. a special list of arbitrators fit to hear consumer disputes, arbitrators must have a college/university degree, must have no criminal record, etc.).
- It is expressly held that disputes from B2C contracts may only be decided in accordance with the applicable law (i.e. *not* pursuant to the principle of equitable discretion, *ex aequo et bono*), and that arbitral awards must always come furnished with an explanation of the ruling.[189]
- Arbitral awards in consumer disputes must expressly advise the parties that they may file a motion in court for nullification of the award.[190]
- A public list of arbitrators is being established, containing those arbitrators who (alone) are authorised to decide consumer disputes (whereas the list shall indicate whether a given individual meets the qualification criteria for deciding this kind of dispute; these arbitrators also agree to be under the supervision of the Czech Ministry of Justice).
- In proceedings on the nullification of an arbitral award, the court may review whether the arbitrators or the permanent arbitral institution decided the consumer dispute to be in conflict with consumer protection law, or in manifest conflict with public morals (*boni mores*) or public policy. In the run-up to the amendment, a broad discussion was held as to whether the courts ought to be authorised to also review the dispute on its merits, i.e. whether it was decided in accordance with substantive law. This would be tantamount to a separate judicial review, and arbitrators would thus essentially have ruled as if they were a first-instance court. In the end, however, the option to review arbitral awards on their merits in consumer disputes did not make it into the final draft of the amendment bill, in spite of the strong support it enjoyed among certain political circles (of course, this judicial review would in any case have been limited to consumer disputes only).

188 As we have stressed elsewhere in this publication, one must not neglect the necessity of a broad assessment of the conduct of properly informed consumers, not only at the time at which the contract is made (even though this particular moment is usually of fundamental importance), but also later, during the implementation of the contract, and on occasion of the enforcement of contractual claims. For the details regarding this issue, see, for instance, Chapter III.9 of this publication, in connection with the ECJ decision in Pannon GSM.

189 Where the underlying subject matter of dispute is a contract other than a consumer contract, the previous arrangement continues to apply, according to which the parties may also agree to have their dispute decided according to the principle of equitable discretion (*ex equo et bono*), or ask that the arbitral award be handed down without any explanation of the grounds for the decision (i.e. the opinion of the arbitration panel).

190 Section 25(2), sentence two of the Arbitration Act, as amended by the Amendment to the Arbitration Act [CZE].

Aside from these mechanisms aimed at the protection of consumers, the Amendment to the Arbitration Act also addresses a variety of other problems that occurred in the past in connection with the application of *lex arbitri*.

3.3. Non-applicability of Class Actions in Arbitration

No one has ever attempted to construe an argument for the admissibility of class actions in arbitration in the Czech Republic, and both the legal scholar and the legal practitioner have remained entirely silent on this point; it is, however, quite obvious that this particular type of action is not permitted pursuant to Czech law.

3.3.1. Arbitration and Rules Applied to Court Litigation: Independence and Interdependence

The very fact that even court litigation knows no full equivalent of the procedure labelled "class action" by the jurisprudence of a number of other countries forces us to conclude that class actions can hardly be possible in arbitration. In the Czech Republic, *lex arbitri* is not part of civil procedural law. The rules of arbitration are contained in a separate law (i.e. the Arbitration Act), which provides a comprehensive legal framework for this type of proceedings. Only in matters of procedural steps (i.e. in matters concerning the course of proceedings) may certain principles and methods contained in the Code of Civil Procedure (for proceedings in courts) be applied *per analogiam*, notably in those cases in which the Arbitration Act (as a special law) contains no special rules.[191] While the rules of arbitration set out in special law (i.e. in the Arbitration Act) must, on the whole, be considered comprehensive, it is still true that they are somewhat fragmentary when it comes to the course of proceedings. For this reason, it is common practice in arbitration to revert to a variety of procedural institutions otherwise used in litigation, which are governed in great detail in the Code of Civil Procedure (in contrast to the Arbitration Act). Typical issues that are treated similarly in arbitration and in litigation due

[191] Section 30 of the Arbitration Act (in an approximate translation, cit.): "Unless where the law [i.e. the Arbitration Act] stipulates otherwise, proceedings before arbitrators shall be governed by the provisions of the Code of Civil Procedure, *mutatis mutandis*". In this respect, see also e.g., the Czech Supreme Court decision 32 Odo 1528/2005, according to which "*the application,* mutatis mutandis*, [of the Code of Civil Procedure in arbitration] above all entails taking into account the general principles upon which Czech arbitration rests, i.e. the application of provisions contained in the Code of Civil Procedure plays out within the framework set by the principles of Czech arbitration* [...]". See e.g. Pezl, Tomáš, Právo na spravedlivý proces v rozhodčí řízení ve světle přiměřené aplikace občanského soudního řádu [title in translation – *The Right to Due Process in Arbitration in Light of a Reasonable Application of the Code of Civil Procedure*], in: Kocina, Jan and Poláček, Bohumil, Aktuální otázky rozhodčího řízení [title in translation – *Current Issues of Arbitration*], Plzeň (Pilsen): Aleš Čeněk, 2011, pp. 36-43; Vlastník, Jiří, Právo na spravedlivý rozhodčí proces? [title in translation – *A Right to Due Process in Arbitration?*], Právní rozhledy, Prague : C. H. Beck, 2012, Vol. 12, No. 1, pp. 1-12; Bělohlávek, Alexander, Zákon o rozhodčím řízení a o výkonu rozhodčích nálezů. Komentář. [translation – Commentary on the Act on Arbitration and on the Enforcement of Arbitral Awards], Prague: C. H. Beck, 2004, commentary on Section 30 of the Arbitration Act, among others.

to this approach are, e.g. collectives of parties, or the prerequisites for initiating proceedings (including obstacles to the proceedings, obstacles to handing down a ruling on the merits), etc. Legal theory and practice in the Czech Republic **have never addressed the permissibility of class action in arbitration under the Czech *lex arbitri***. However, if we are to conclude that **class actions (in the true sense of the word) are not permissible** in court litigation, the same conclusion must also be drawn with respect to arbitration.

3.3.2. Individualisation concerning Arbitration Agreements (and concerning Parties to Dispute Resolved in Arbitration)

As in the case of litigation, which in the Czech Republic is marked by a high degree of individualisation, focusing on a concrete dispute between a concrete claimant and a concrete respondent, arbitration in the Czech Republic is also individualised. This concept is elevated to the status of a fundamental principle of arbitration, also in procedures in connection with the jurisdiction of the arbitrators: persons who are not bound by an arbitration agreement principally cannot be party to the arbitration procedure, and arbitration agreements principally cannot be extended to also apply to third parties. Arbitration procedures are always about an individual dispute pursuant to a concrete (individual) arbitration agreement. The only exception, according to which someone who never entered into the [specific] arbitration agreement may nonetheless be a party to the arbitration procedure is the case of legal successorship,[192] be it by operation of law or on a contractual basis (e.g. the assignment of a receivable under an agreement that is covered by an arbitration clause, etc.). The specific dispute is tied to a very concrete arbitration agreement.

This principle has now been reinforced in the wake of the Amendment to the Arbitration Act (coming into force as of April 1, 2012) and in connection with B2C disputes (i.e. disputes arising from a contract between a commercial entity/trader – a "business" – and a consumer).[193] The Amendment to the Arbitration Act

[192] See, for instance, Steiner, Marek, Zákaz denegatio iustitiae a procesní nástupnictví title in translation – *The Prohibition of Denial of Justice and Procedural Succession*], Právní rozhledy, Prague: C. H. Beck, 1999, Vol. 7, No. 11, p. 593. The cited author does not explicitly address arbitration issues, but his conclusions regarding proceedings in the general courts (litigation) may be transferred also to other types of proceedings.

[193] Bělohlávek, Alexander, Autonomy in B2C Arbitration: Is the European Model of Consumer Protection Really Adequate? in: Bělohlávek, Alexander and Rozehnalová, Naděžda, CYArb – Czech (& Central European) Yearbook of Arbitration, Huntington (New York): JurisNet, 2012, Vol. II; Nový, Zdeněk, Spotřebitelské úvěry a rozhodčí řízení [title in translation – Consumer Loans and Arbitration], Jurisprudence, Prague, 2010, No. 8, pp. 22 et seq.; Bělohlávek, Alexander, Rozhodčí řízení v tzv. smluvních vztazích spotřebitelského typu [title in translation – *Arbitration in B2C Relations*], Právní fórum, Prague : Wolters Kluwer, 2010, No. 3, pp. 89 et seq.; Hrnčiříková, Miluše, Platnost rozhodčí smlouvy aneb jaký vliv může mít určení povahy rozhodčí smlouvy na praxi [title in translation – *The Validity of Arbitration Agreements, or: What Are the Practical Consequences of Determining the Nature of Arbitration Agreements*], Právní fórum, Prague : Wolters Kluwer, 2011, No. 8, pp. 373 et seq.; Hulmák, M. et Tomančáková, B., Rozhodčí řízení jako vhodný prostředek řešení sporů mezi dodavatelem a spotřebitelem [title in translation – *Arbitration As a Suitable*

presupposes that the parties to an arbitration agreement have waived their right to have the merits of their dispute heard and decided by a court, instead delegating this power to a private-law entity. In consumer disputes, an arbitration agreement is valid if it was **made separately** (i.e. in a separate document), as opposed to being a part of the terms by which the main contract is governed (under pain of nullity). This avoids, for instance, arbitration clauses "hidden" somewhere in the terms of contract. Arbitration agreements for consumer disputes must contain the following information by law (whereas such information must be accurate and complete): (i) information regarding the arbitrators, or a provision according to which a permanent arbitral institution will decide the dispute, (ii) information regarding the manner in which the arbitration procedure shall be initiated and conducted, (iii) information on the compensation paid to the arbitrator(s) and on the anticipated kinds of costs that may be incurred by the consumer in the arbitration procedure, and on the rules under which the party is awarded reimbursement, (iv) information on the venue (place of proceedings) of arbitration, (v) information on the manner in which the arbitral award is served unto the consumer, and (vi) information on whether a non-appealable arbitral award in the matter will be directly enforceable. If the parties agreed on the jurisdiction of a permanent arbitral institution, then a reference to that institution's charter (by-law) and rules will suffice.[194] In any case, the high degree of individualisation of disputes in arbitration, and of the arbitration clauses made by parties to various disputes, must be stressed. The existence of an arbitration agreement between an individual consumer and their contractual partner (i.e. the businessperson/commercial operation) needs to be reviewed *ex officio*. In fact, the concept of arbitration established in the Czech Republic rules out any legal fiction when it comes to the binding power of arbitration agreements.[195]

In the past, Czech law expressly provided for one single exception under which a person who was not party to the given arbitration agreement could nonetheless be bound by that agreement. This was the case of agreements on the takeover of

Means of Dispute Resolution between Suppliers and Consumers], Obchodněprávní revue, Prague : Prospectrum, 2010, Part I: No. 6, pp. 168 et seq., Part II: No. 7, pp. 189 et seq.

194 Their publication in the *Commercial Gazette* is obligatory (as it was under the previous arrangement).

195 See, for instance, resolution Rsp 1734/11 issued in an arbitration procedure before the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic, of November 7, 2011, according to which (cit.): "The transfer of the authority to hear cases and decide on the subject matter (substance) of the given dispute is a major deviation from the constitutionally guaranteed right of the parties to judicial protection; this deviation, and exception, is legitimised by the law – subject, however, to the terms set out by the law. It is precisely for this reason that the issue of jurisdiction must be resolved beyond any doubt. This applies all the more in those cases in which the respondent duly raised the objection of a lack of jurisdiction of the arbitration court. In such cases, no legal fiction or assumption may be created, unless the fiction or assumption is expressly recognised by a law or in an understanding between the parties (including the rules that, according to the parties, are applicable to the proceedings in the given matter)." Annotated by: Bělohlávek, Alexander, in: Bělohlávek, Alexander and Rozehnalová, Naděžda. CYArb – Czech (& Central European) Yearbook of Arbitration, Huntington (New York): JurisNet, 2012, Vol. II.

a company's assets by the majority shareholder between the said majority shareholder and the company whose assets they were to absorb. These agreements could contain an arbitration clause that also extended to the claims of other members/shareholders for adequate compensation for their shares. These [other, minority] members/shareholders were thus bound by an arbitration clause that they had not themselves concluded. However, this approach did not pass the test of time, and was eventually not carried over to the amendment passed several years ago. Even so, the said exception only included certain elements typical for class actions; it certainly could not have been said to be true class action, in that even in those cases, each concrete dispute had to be individualised.

Another important point to raise is the fact that, for a broad range of disputes for which class action would principally be a conceivable solution and for which Czech law provides certain elements that are representative of class action (such as *res judicata* for other claims of the same nature), the jurisdiction to hear and decide them lies solely with the general courts. This concerns, in particular, corporate action in connection with the transformation of companies, etc.[196]

3.3.3. Individualisation of Disputes; Confidentiality of Arbitration

Arbitration procedures are principally confidential and non-public.[197] Not only are Arbitrators (and permanent arbitral institutions) not obliged to, but are essentially not *allowed* to inform any persons other than the parties to the given dispute of the fact that a procedure was initiated, or of the course of proceedings or the nature of the dispute. In this respect, there are no exceptions, unless the arbitrators (or the permanent arbitral institution) were to be relieved of their obligation of secrecy or even instructed by the parties to make certain public announcements, or if the presiding judge of the district court at the place of residence of each individual arbitrator were to relieve the arbitrators of secrecy based upon an official decision. By contrast, the institution of class action in its typical manifestation presupposes that the general public (or, as the case may be, affected persons who are not parties to the proceedings) learns of the initiation of proceedings, the outcome of which may affect them, so that they may accede to the proceedings if they wish. This requirement cannot be upheld within the boundaries of the arbitration concept implemented in Czech law.

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196 Holejšovský, Josef, Valné hromady společností s ručením omezeným [translation – *General Meetings of Limited Liability Companies*], Prague: C. H. Beck, 2011, pp. 311-312; Svoboda, Karel, Jak vyzrát na "nespory" [title in translation – *How to Cope with "Non-disputes"*], Právní fórum, Prague: C. H. Beck, 2007, Vol. 4, No. 4, pp. 130-133.

197 Section 18 of the Arbitration Act.

3.3.4. Effects of Arbitral Award

Upon service, decisions on the merits issued in arbitration (i.e. arbitration awards) have the same effects as a court decision. Arbitration awards thus represent the obstacle of *rei judicatae* for "the same dispute" (i.e. a dispute over the same matter between the same parties).[198] Arbitrators are not in a position, however, to decide on the validity of contracts between certain contractual parties, unless all of them are also parties to the given arbitration procedure.[199] In other words, a specific arbitral award always only operates (in terms of its *res judicata* effect) on the parties to the concrete procedure (*inter partes*) as a matter of principle. Extending the effects of arbitral awards to any third persons who were not party to the specific arbitration agreement (arbitration clause) based upon which the arbitration procedure was conducted would run counter to the principles of arbitration that are recognised and enforced in the Czech Republic.

3.4. Final Observations regarding Class Actions in Arbitration

In the Czech Republic, arbitration is a very widespread method of dispute resolution. Arbitral awards handed down in the Czech Republic are directly enforceable, requiring no separate proceedings to confirm enforceability (*exequatur* proceedings). The use of the institution of class actions, however, is at odds with the fundamental principles applied in arbitration. For this reason, class actions are not permissible in arbitration in the Czech Republic. For that matter, as we have seen, class actions in their typical manifestation are also all but unknown in civil litigation pursuant to Czech law. Class actions in conjunction with arbitration is completely uncharted territory, and has never been discussed in professional circles in spite of the very large corpus of literature on arbitration available in the Czech Republic, nor has the lawmaker announced any imminent changes to this state of affairs. In fact, neither the business world nor legal practitioners are at all calling for such a discussion – quite to the contrary, the debate is headed in the opposite direction, towards maximising the individualisation of claims, whether heard in litigation before courts or in arbitration (while at the same time making these [individual] procedures faster

198 See, for instance, the Czech Constitutional Court's ruling I. ÚS 3227/07 of March 8, 2011, according to which "[...] an arbitration procedure precludes a parallel civil court procedure in the same matter; awarding the effects of a non-appealable court decision to an arbitral award likewise constitutes a res judicata obstacle to a court reviewing the same matter [...]".

199 See, for instance, interim arbitral award Rsp 981/11 handed down in an arbitration procedure before the Arbitration Court attached to the Economic Chamber of the Czech Republic and the Agricultural Chamber of the Czech Republic. Annotated by: Růžička, Květoslav, in: Bělohlávek, Alexander and Rozehnalová, Naděžda, CYArb – Czech (& Central European) Yearbook of Arbitration. Huntington (New York): JurisNet, 2012, Vol. II. The said decision, e.g. states, inter alia (citing from the abovementioned annotation): "*A final (non-appealable) arbitral award has the same effects as a non-appealable judgment by a [general] court. However, with a few specific exceptions [that need not interest us in the present case], an arbitral award is a decision whose effects are limited to the parties (*inter partes *effects)*. [...] *The arbitrators are not in a position to pass any decision that affects the rights and obligations of a third party*" .

and more efficient). In other words, expanding and promoting other forms of ADR are being contemplated, just not in the form of class actions. That being said, one cannot rule out that the Czech lawmaker (and, in its wake, legal practice) will one day tackle the implementation of the institution of class actions – at this moment, however, class actions are not an item on the agenda.

Class Actions and Arbitration – Denmark

Jeppe Skadhauge*

1. Overview of the relevant rules

1.1. The Danish Administration of Justice Act and the Arbitration Act

The Danish Administration of Justice Act ("AJA") applies to the administration of justice by the ordinary courts (s 1(2)).[200] The Danish Arbitration Act ("AA") applies to arbitration, including international arbitration, if the place of arbitration is Denmark (s 1(1)).[201]

Arbitration is widely used in Denmark, both in domestic and international cases. Ad hoc arbitration is frequently used. Institutional arbitration is also well known.

Many arbitration clauses refer to the Danish Institute of Arbitration.[202]

Most construction disputes are subject to arbitration pursuant to the general terms of contract used in nearly all major construction contracts referring to the Building and Construction Arbitration Court (*Voldgiftsnævnet for bygge- og anlægsvirksomhed*), which is a specialized arbitration institute.[203]

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200 Retsplejeloven, Consolidated Act no. 1063 of 17 November 2011.

201 Denmark became a Model Law country in 2005 when the AA took effect (Lov om voldgift Act no. 553 of 24 June 2005, as officially published in Lovtidende. The 2005 Act replaced the Arbitration Act 1972. Act no. 181 of 24 May 1972. With very few exceptions the 2005 Act is a complete adaptation of the 1985 Model Law (without the 2006 Amendments). For a comparison of the 2005 Act and the 1985 Model Law see Ole Spiermann, National Report for Denmark (2009), International Handbook on Commercial Arbitration, Paulsson (ed), (1984) Kluwer Law International. For a commentary in English on the AA see Ketilbjørn Hertz Danish Arbitration Act 2005, (2005), DJØF.

202 The Danish Institute of Arbitration, which is a non-profit private foundation, was founded in 1981. According to Article 2 of its Statutes, the object of the Danish Institute of Arbitration is the promotion of arbitration in accordance with the Rules of Arbitration Procedure laid down by its Council through arbitral tribunals appointed by the Danish Institute of Arbitration on a case-by-case basis. All kinds of national and international disputes are within the remit of the arbitral tribunals appointed by the Danish Institute of Arbitration. There are no limitations in the range of subjects for which the Danish Institute of Arbitration appoints arbitral tribunals, apart from such cases as have to be brought before an ordinary court of law by mandatory legislation, see website www.voldgiftsinstituttet.dk.

203 The Building and Construction Arbitration Court was set up on 1 January 1973. According to s 1 of its statutes the Building and Construction Arbitration Court decides disputes between parties having agreed that already existing or future disputes within building and engineering activities

In principle, disputes about legal relationships under which the parties have an unrestricted right of disposition may be settled by arbitration (s 6 AA). Actions involving disputes that by agreement between the parties are subject to settlement by arbitration will be dismissed by the courts if so requested by a party, unless the arbitration agreement is null and void, or other reasons may prevent such arbitral proceedings (s 8(1) AA). The parties may agree to submit to arbitration already existing or potential future disputes arising out of a defined legal relationship, whether contractual or not (s 7(1) AA).

In a consumer contract, an arbitration agreement made before the dispute arose is not binding on the consumer (s 7(2) AA).

1.2. Class actions

Part 23 a (s 254 a – k) of the AJA includes special rules on class actions.

The rules of the AJA on class actions have been in force since 1 January 2008.[204] In principle these rules may be applied to all actions that are subject to the jurisdiction of the ordinary courts (s 1 AJA).

The purpose of introducing class action rules is to strengthen the use in practice of existing substantive law, see Parliamentary Report 1468 p 236f.[205]

The purpose is to allow another type of proceedings that may provide an additional way of efficiently handling disputes concerning a major number of similar claims.[206]

The AA does not include any such provisions on "class arbitration" as the provisions on class action in the AJA.

shall be settled by this arbitration court. Such an agreement has been made, when the parties have accepted the General Conditions for the provision of works and supplies within building and engineering of 10 December 1992 (AB 92), the General Conditions for Consulting Services of October 1989 (ABR 89) or the General Conditions for turnkey contracts of December 2003 (ABT 93).

204 The rules are based on a parliamentary report (no. 2005 1468) on class actions etc. The rules were implemented in the AJA by means of Act no. 181 of 28 February 2007.

205 Existing rules and principles on the burden and standard of evidence will remain in force, unamended, p 237. The Standing Committee for Procedural Law found that the introduction of class action rules would lend weight to society's focus on ensuring up-to-date procedural rules governing the handling of a considerable number of similar claims, in particular if the size of the individual claim is modest, see Parliamentary Report 1468 p 237.

206 The problem of the existing rules on joinder and test actions was, in the view of the Standing Committee for Procedural Law, that the use of the options provided for by these rules is subject to all parties agreeing to use these options. According to the Standing Committee for Procedural Law, this option was not available in a number of actions, see Parliamentary Report 1468 p 22.

1.3. Consolidation of individual actions

The alternative to a class action is individual actions heard in accordance with the general rules of the AJA.

The distinction between class actions and ordinary joinder is that not all persons with claims to be settled during a class action participate as parties to the legal action because one or several persons "represent" the group members not taking actively part in the legal action (so-called "representative" legal actions), see Parliamentary Report 1468 p 16. The main characteristic is that decisions on merits have legally binding effect (legal force) on members of the group in the class action although they are not parties to the action, see Parliamentary Report 1468 p 200.

Individual actions may be consolidated under the ordinary rules on joinder of parties (p 250 AJA).

According to s 250(1) AJA several parties may sue or be sued in the same legal action provided (i) Denmark is the proper venue for all claims, (ii) the subject-matter of at least one of the claims falls within the jurisdiction of the relevant court, (iii) all claims are subject to the same procedural rules and none of the parties submits any objections, or (iv) the claims are connected to such an extent that they should be consolidated notwithstanding any objections.[207]

During the proceedings, each party will appear independently of the other parties. Each party submits its own claim, raises its own allegations and states the evidence on which the party intends to rely. Each party decides whether to appeal the judgment and may appeal decisions on claims made by or against that party. The several, named persons may choose whether to be represented individually during the proceedings or whether – to a higher or lesser degree – they wish to be represented jointly, for example by the same counsel.

Generally, a party having made an arbitration agreement may oppose a consolidation of cases at the courts; see decision by the High Court (VL) of 25 March 1997, reported in the Danish weekly law reports ("UFR) 1997 p 806. Cf decision by the High Court (VL) of 2 August 2001, reported in UFR 2001 p 2392. See also Anders Ørgaard Voldgiftsaftalen p 50f, (2006) DJØF.

[207] Consolidation of several claims between more than two parties is in Danish legal theory called "subjective" consolidation. Consolidation at the commencement of an action is called "original". "Original consolidation" may only be initiated by the plaintiff or the defendants, and the consolidation is implemented by claims against more defendants and/or claims from more defendants being consolidated in either one writ or in writs filed together with a request that the claims be heard in accordance with the consolidation rules. If new claims are consolidated after the commencement of an action the consolidation is called "subsequent". Subsequent consolidation can become effective if an additional party is sued by the previous parties (joinder) or if a third party at its own volition intervenes as party to the legal action (intervention)

The AA does not include any provisions on joinder of parties. It is generally assumed that s 250 of the AJA cannot be applied mutatis mutandis on arbitration.

2. Presentation of the national class action system

The special class action rules under the AJA apply to "similar claims" made on behalf of "multiple persons" (s 254 a(1) AJA). It is not possible to bring a legal action against a group under the rules on class actions.

A claimant is not obligated to apply the class actions rules even though the requirements under the act for their application have been fulfilled. The class action rules constitute an additional option for the claimant.

A class action may be consolidated with other class actions and also with other individual actions under the general rules on consolidation of claims (s 250 AJA).

To meet the requirement of "similarity" it suffices for the claims to be similar in fact and in law. They need not be identical.[208]

"Multiple persons" may in principle be two, but if so, it will be difficult to meet the additional requirement under the act that a class action must be deemed to be the best way to hear the case (s 254 b(1)(1) AJA).

The aditional requirements for bringing a class action are set out in s 254 b (AJA) and can be summarized as follows.

- Denmark is the proper forum of all claims.
- The court has jurisdiction over at least one of the claims.
- A class action is considered the most expedient way to hear the claims.[209]
- The class members can be identified and notified of the action in an expedient way.

[208] In the matter decided by the High Court (VL) on 24 January 2012, reported in UFR 2012 p 1561, a number of purchasers of an investment product had formed an association to act as class representative in an action against the vendor bank. Although there might be individual differences regarding the circumstances under which the individual investors had made their investment the court found that fundamentally the claims were of "a similar nature" fulfilling the requirements under the class action rules. The condition that claims must be similar may prevent, depending on the circumstances, a claim under a class action from being made for individual measure of damage based on the individual subjective circumstances of the specific class action members. If so, the class action must be limited to such an extent that these individual circumstances cannot be settled as part of the class action for example by limiting the class to a claim for a declaration regarding the basis of liability, see Parliamentary Report 1468, p 267.

[209] Class actions are more complicated and resource-demanding than individual actions. The advantage of class actions is that at best a class action may replace a considerable number of individual actions. It is therefore a condition that a class action is considered the most expedient way to hear the claims.

- A class representative can be appointed. The court appoints a class representative, if the court considers the requirements fulfilled (s 254 e (1) AJA). The parties to the class action will then be the class representative and the defendant, see s 254 f(1) AJA.

A natural consequence of class actions is that the class members are not parties to the action in the traditional sense. They are merely represented as provided for under the law subject to an opting-in or not opting-out procedure, see below.

It is up to the court to decide whether the claims are sufficiently similar for a class action to be expedient.[210]

The need for class actions depends on the alternatives available. The assessment of the suitability of class actions for dealing with the individual claims must be based on a comparison of the class action with its realistic alternatives in that particular situation, see Parliamentary Report 1468, p 23.

Depending on the circumstances, there may be one or several individual actions, including actions where the claims are heard jointly under the general consolidation rules of the AJA. It may also be a test case. When many similar claims are brought before the courts, the respective courts handling the individual cases may decide to postpone the actions pending the outcome of one or several typical actions under s 345 AJA. It is further assessed whether the proposed class representative has special abilities to contribute to expedient coordination etc or in any other way than a class representative in a class action, for example as an intervening party or as a representative of one or more parties to an individual action, see Parliamentary Report 1468, p 244.

The assessment will further include the possibility under s 254 AJA for a court to decide that several actions between the same or various parties must be heard in connection with each other.

Alternatively, the possibility of imposing sanctions under public law or criminal law should also be taken into consideration. The Consumer Ombudsman has for

[210] The Standing Committee for Procedural Law found it important to word the rules in such a way that a class action decision can be approved, and in most cases should be made, quickly and without the parties, and in particular the defendant, having to apply many resources to this question. In practice, the action cannot be considered decided on the merits, when the court has ruled on the question of approval. In its wording of its proposal, the Standing Committee for Procedural Law has considered it vital to ensure that class actions cannot be abused, for example to "force" commercial businesses to settle unjustified claims. One of the Committee's proposals is that the court should make a separate ruling in order to allow an action to be heard under the class action rules. Further that the court has to approve the class representative and that the class representative may be ordered to provide security for the legal costs that it may be ordered to pay to the defendant, if the action is lost wholly or partly, see Parliamentary Report 1468, p 23.

example the authority to bring actions for prohibitions and injunctions under s 13 of the Marketing Practices Act, see Parliamentary Report 1468, p 245.

A class action is commenced by the filing of a writ with a court, see s 254 d(1) AJA. In addition to complying with the statutory requirements the writ must include a description of the "class", details on how the class members may be identified and notified of the action and a proposal for a class representative who is willing to accept the appointment, see s 254 d(1).[211] Class actions are in principle governed by the same procedural rules as individual actions, see Parliamentary Report 1468, p 242.

The court determines the framework of the class action, ie the claims to be included in the class action. The legislative history of s 254 e(4)[212] provides the court with a wide discretionary power to decide what claims must be included in the class action. The court may later change the framework, see s 254 e(4).[213]

The class action includes all class members opting in, unless the court decides that the class action includes all class members not opting out, see s 254 e(5). The opting-in model is assumed to be the most applied method.

The opting-out model is assumed to be used only exceptionally. Where it is evident that the small size of a class action claim will render it inexpedient to bring individual actions, and a class action with an opting-in mechanism will not be considered an expedient way to hear the claims, the court may decide, upon request from the class representative, that the class action must include all class members who have not opted out of the class action, see s 254 e (8).

The framework must be defined before permission can be given for the class members to opt in or, if relevant, opt out of the class action.

An arbitration agreement between one or more potential class member(s) and the opposing party may prevent such member(s) from opting-in.

In practice, the court and the class representative will typically have no knowledge of such arbitration clause, and the opting-in method will therefore be accepted initially. If the opposing party then chooses to rely on the arbitration clause, the action must be dismissed as far as that claim is concerned or the court may hold, by decision or order, that the party in question cannot be part of the class action, see Eigil Lego Andersen, "Gruppesøgsmål", 2007, p 131.

211 S 254 c AJA sets out detailed rules on who may qualify as a class representative.

212 FT 2006-07, supplement A, p 1372ff.

213 In its decision in the bankTrelleborg matter referred to below the High Court commented that its acceptance of the class representative's request for a change of the framework did not involve any increase of the claims already included and that the changes were exclusively based on practical reasons.

The court fixes a deadline for opting in or out, see s 254(6)-(8) AJA.

The persons whose claims fall within the class action must be notified of the matters listed in s 254 e(1)-(8) and the legal effects of opting in or out of the class action, see s 254 e (9) AJA.[214]

The court's decisions in a class action are binding on the class members who have joined the class action, see s 254 f(2) AJA.[215] In class actions with an opting-out mechanism the court's decision is only binding on class members who could have been sued in Denmark for that claim at the commencement of the action, see s 254 f(2), second clause.

The court may order a class member to pay legal costs to the defendant and/or the class representative, see s 254 f(3). The court may require that class members opting in provide security for legal costs, see s 254 e(7).[216]

If a class action is withdrawn or dismissed, a class member may intervene as a party in respect of the relevant claim by submitting to the court a written notice to that effect within four weeks and proceed with the action under the rules on individual actions. This is also so, if the court decides that a claim does not fall within the class action, see 254 g(2).

Settlements made by the class representative on claims included in the class action will be valid when approved by the court. The court will approve the settlement unless the settlement involves unfair discrimination of the class members or the settlement in general is manifestly unfair, see s 254 h AJA.

The court notifies the class members included in the class action of its judgment, see 254 i.

If the class representative appeals against the judgment, the above-mentioned provisions in s 254 e(5)-(9) apply mutatis mutandis, see s 254 j(1) AJA. If no appeal

214 At any time during the handling of the class action, the individual class members may make any decisions, including out-of-court settlements, about their potential claims, see Parliamentary Report 1468, p 269. The notifying costs will temporarily be paid by the class representative.

215 However, as to decisions on counter claims this only applies to claims arising out of the same contract or the same circumstances on which the class members' claim is based, see s 254 f(2), second clause.

216 AJA s 254 e(2) provides the court with the right to demand that the class representative provides security for the legal costs that the opposing party may be awarded. In its decision of 12 June 1012, reported in UfR 2012, p 2938, the Supreme Court held that the security shall cover the legal costs in connection with the hearing of the case in one instance. The Supreme Court also held that the amount of the security must be determined discretionarily giving a certain consideration to the value of the case and the nature and scope of the case and the work involved. The Court upheld a decision of the lower court requiring that both the group representative and each class member provide security.

is made by the class representative, an appeal may be lodged by anyone eligible to qualify as a class representative, see s 254 j(2) AJA. A class member whose claim is not included in the appeal may appeal against a judgment, but only if the judgment affects that member's claim.

Danish case law on class actions is very scarce.[217] In its judgment of 27 January 2012[218], the Danish Supreme Court ruled on a class action brought by the previous minority shareholders of a Danish bank "bankTrelleborg a/s" against another Danish bank "Sydbank A/S" and the Danish Financial Supervisory Authority (FSA). In 2008, when bankTrelleborg a/s merged with Sydbank A/S, the minority shareholders had to accept a compulsory redemption of their shares. The Supreme Court held that the compulsory redemption was unlawful, but it did not find any grounds for accepting that the value of the shares was higher than the amount received.

In this class action the class representative was organized as an association, whose purpose was "to safeguard the financial and undivided interests held by the members as minority shareholders of bankTrelleborg vis-à-vis individuals, companies, trusts and authorities that had inflicted losses on the members or contributed to or benefitted from the compulsory redemption of the member's shares in bankTrelleborg" and to be eligible as class representative.[219]

The High Court commented that it should perhaps be considered whether it should be possible to make membership of a specific association a condition for joining a class action or to stipulate other conditions not relating to the main issue of the action. Such a condition could have the result, depending on the circumstances, that the case had to be declared incompatible with a class action. Considering the unique nature of this action with up to 15,000 potential members of the class action, the purpose and activity of the association and the parties' position thereto,

217 A list of class actions pending before the Danish courts is available on the website of the Danish Court Administration www.domstol.dk.

218 Reported in UfR 2012 p 1228. In this matter proceedings before the court of 1st instance began in February 2008. The fact that the Supreme Court rendered its judgment in only January 2012 suggests that the class action system of the AJA is an efficient option.

219 *See* article 2 of the articles of association. Those entitled to join as members were any individual or company etc who at the beginning of 22 January 2008 held shares in banktrelleborg except for Fonden for bankTrelleborg [the previous principal shareholder], Sydbank A/S [the acquiror] and members of the [executive] management of bankTrelleborg, bank Trelleborg a/s and Sydbank A/S, see article 3 of the articles of association. On opting in, the member authorized the counsel for the association to act as its representative as detailed in the articles of association, including bringing a class action which each member could join in accordance with the general statutory rules, but not bringing any legal action on behalf of the individual member, see article 4 of the articles of association. The association or counsel could not make any legally binding agreement involving a member's claim, but could initiate negotiations in order to prompt an offer from a third party, which was then to be accepted or refused by a member, see article 4 of the articles of association.

the High Court found that the membership requirement did not render the claims incompatible with a class action.[220] [221]

The High Court decided that the individuals whose claims fell within the framework should be notified by the association and that the first notification must be forwarded electronically to all members whose e-mail addresses are known to the association and by letter to all other members and that all compulsorily redeemed minority shareholders should be notified by VP Securities [the approved Central Securities Depository (CSD) in Denmark and Luxembourg] of the class action and of the procedure for downloading the first notification and the opting-in form, see decision of the High Court of 4 February 2009.

3. Class action and arbitration

3.1. The concept of "class arbitration"

The concept of "class arbitration" is not known in Danish arbitration law. The AA does not include any provisions on "class arbitration" such as the provisions on class action in the AJA.

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220 High Court (ØL) decision of 21 November 2008. See also High Court (VL) decision of 25 February 2011, reported in UFR 2011 p 1596. Investors in a windfarm who had formed an association, were permitted to have actions initiated against the vendor companies concerning alleged liability for incorrect and misleading information on the project proceed as a class action, the association being the class representative.

221 By order of 21 November 2008, as subsequently amended on 12 May, 2 June and 30 June 2009, the High Court designated the framework of the class action as follows: "An individual (including companies, estates, etc) who

1. held shares in bankTrelleborg a/s at the beginning of Monday 21 January 2008,
2. has later been subject to a compulsory redemption by Fonden for bank Trelleborg,
3. on opting in or no later than eight weeks from the expiry of the opting-in deadline submits the relevant documentation considered acceptable by the class representative; and
4. on opting in or at the expiry of the opting-in deadline is a member of the Association of Minority Shareholders in bankTrelleborg and has paid the membership fee,

may join the class action."

Individuals granted permission under s 254 e(6) of the AJA to opt in after the deadline must, however, submit documentation, see item 3 above, six weeks after the court's permission and must become a member of the Association of the Minority Shareholders in bankTrelleborg no later than six weeks after the court's permission and must also have paid the membership fee ... Fonden for bankTrelleborg [the previous principal shareholder], Sydbank A/S [the acquiror] and members of the management of Fonden for bankTrelleborg, bank Trelleborg a/s and Sydbank A/S cannot qualify as members of the Association of Minority Shareholders in bankTrelleborg and therefore not join the class action.The class action includes the participating class members' claim against Fonden for bankTrelleborg, Sydbank A/S ...and the FSA based on the grounds that the compulsory redemption ... was unlawful and invalid, which also applies to the participating members' pecuniary claims against the defendants due to the unlawful or invalid compulsory redemption...The participants' financial claims against the defendant are in the form of claims for payment of a specified amount for each compulsorily redeemed share to such an effect that the amount claimed per compulsorily redeemed share will be the same for all participants notwithstanding when, how and at which price the individual member acquired the compulsorily redeemed shares".

The legal history of the AA does not involve any deliberations on the introduction of special rules on "class arbitration".

Neither do the Rules of Procedure 2008 of the Danish Institute of Arbitration[222] nor the rules of the Building and Construction Arbitration Court (VBA Voldgiftsregler 2010) include provisions on "class arbitration".

There are several reasons why focus on arbitration in Denmark has not been very much on "class arbitration".

A plausible explanation is the implementation of the special rules on class litigation in AJA. The implementation of these rules thus sets up a relevant procedure for hearing similar claims. A procedure that, contrary to arbitration, does not depend on an agreement between the parties.

To submit a dispute to arbitration the parties must make an agreement to that effect (s 7 AA)[223]. A class action may often be relevant for disputes that have not arisen out of an agreement between the parties, but out of tortious acts. Under such circumstances no prior agreement will have been made to submit disputes to arbitration.

If for reasons of confidentiality parties are interested in arbitrating a dispute about for example claims against competitors for compensation for violation of the competition rules, it will be possible for them, within the framework of the AA, to make a subsequent agreement on arbitration tailor-made to ensure an efficient hearing of the claims, provided the parties are willing to do so.

In other circumstances where class arbitration may be relevant, for example when standard contracts between business operators and consumers are involved, the legislator has decided that arbitration agreements made before a dispute arose will not be binding on the consumer. Therefore, the business operator will usually not include any arbitration clause in a consumer contract. It will seldom be more advantageous for a consumer to make a subsequent agreement about arbitration than to submit the dispute to the ordinary courts.

222 The Rules of Arbitration Procedure (2008) of the Danish Institute of Arbitration explicitly address situations involving two or more claimants by providing for joint appointment by multiple claimants or respondents, failing which, appointment is made by the Institute (Art. 18). New Rules of Arbitration Procedure effective 1 May 2013 permit consolidation of arbitrations and joinder of third persons, see 3.2 below.

223 An arbitration agreement usually involves two parties, but it may include more than two parties. An arbitration clause allowing more than two parties to participate in the arbitration should specify the parties included and that the dispute can be settled in joined arbitration proceedings. The clause should also define the appointment of arbitrators, see Anders Ørgaard Voldgiftsaftalen p 49 (2006) DJØF.

It is not likely that special class arbitration rules will be introduced into the AA in the near future.

3.2. Consolidation in arbitration

The AA does not include any rules on consolidation of disputes.

Failing an agreement between the parties to an arbitral dispute, neither a party nor the arbitral tribunal may include more parties – neither in the form of any additional claimants or respondents nor through a consolidation of already existing arbitrations between these additional parties and the claimant or respondent, respectively. A fundamental reason for this restriction is the legitimate interest of the claimant or respondent, as the case may be, in avoiding an expansion of the case, a delay or an increase in costs.[224]

The AA does not provide any authority for an arbitral tribunal to enforce, at the request of a party or a third party, the consolidation or joinder of claims or parties – against an objection from a party. This is so even though the other parties may have similar claims which it would be expedient to refer to the same arbitral tribunal – both to save litigation costs and to arrive at similar decisions.

Third parties who are not parties to the arbitration agreement cannot be included in the arbitration unless they give their consent. Further, the intervention in an arbitration by a third party not being a party to the arbitration agreement requires the consent of the parties to the arbitration agreement.[225] Moreover, the acceptance of the arbitral tribunal, if established, is required.

Nor does the AA provide any authority for the ordinary courts to enforce a joinder of parties.

In case law the authority under the AA for the ordinary courts to assist in (an arbitration in connection with a dispute as to) the appointment of the arbitral tribunal (s 11(3)) is not considered applicable to enforce the joinder of parties.

While s 11(3) of the AA provides that "[w]here, under an appointment procedure agreed upon by the parties or pursuant to subsection (2), the arbitral tribunal is not successfully constituted, any party may request the courts to appoint the arbitrator or arbitrators who have not been appointed ... " arbitrations cannot be consolidated through the courts by virtue of this provision.

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224 *See* Jakob Juul and Peter Faurholdt Thommesen Voldgiftsret p 225 (2nd edition) (2008) Thomson. See also Håkun Djurhuus, Christian Lundblad, Steffen Pihlblad and Claus Søgaard-Christensen Praktisk voldgiftsret p 46 (2011) DJØF.

225 *See* Voldgiftsret p 226 and Praktisk voldgiftsret p 47.

In its decision of 26 May 2005 (reported in UfR 2005 p 2560) on the similar provision in s 3 of the previous 1972 Arbitration Act the Maritime and Commercial Court ruled on the question of the courts' right to decide that more arbitrations must be consolidated. In connection with the arbitrations between a Danish insurance company and a number of reinsurance companies, the insurance company requested the Court to order the reinsurance companies to accept that the actions be consolidated and that the insurers jointly appoint one arbitrator. Two of the reinsurance companies claimed that there was no authority for the Court to allow the request. The Court found that s 3 of the 1972 Arbitration Act [now s 11(3) of the AA] did not give the courts authority to decide that more parties to arbitrations not based on the same agreement had to appoint one joint arbitrator or to accept that their claims be consolidated.[226]

The AA does not prevent two or more parties from agreeing to – either before or after the dispute has arisen – the joinder or consolidation (of claims or parties) provided the dispute is arbitrable.

An agreement on joinder may be worded as a reference to the authority under s 250 of the AJA. For the joinder of parties it is advisable to add provisions on the appointment of the arbitral tribunal so that objections against the composition of the arbitral tribunal can be avoided. Objections against the composition of an arbitral tribunal may form the basis of a setting aside the award, see s 37(2)(1)(d) of the AA.

According to s 16(1), first sentence, of the AA, the arbitral tribunal rules on its own jurisdiction. Therefore, the arbitral tribunal decides which claims are governed by the arbitration agreement.[227]

Generally, an agreement on submitting a dispute to institutional arbitration can hardly be considered implied acceptance of consolidation of all claims for which the same dispute resolution forum has been elected, see Anders Ørgaard Voldgiftsaftalen p 51f (2006) DJØF.

The question of consolidation regularly arises in disputes within building and construction.[228] In Denmark building and construction agreements are often based

[226] The Maritime and Commercial Court further held: "Under s 3 of the 1972 Arbitration Act, the courts assist, upon request, in the conduct of the arbitral proceedings as exemplified in that provision. In consequence of its wording and its legal history, the courts must, upon request, ensure to the extent possible the proper conduct of the arbitral proceedings if the parties have chosen such proceedings. However, the provision does not give the courts authority to decide that more parties to arbitral proceedings based on the same agreement have to appoint one joint arbitrator or must accept that their claims be consolidated."

[227] If a party has made a timely objection against the jurisdiction of the arbitral tribunal, the party may request the ordinary courts to rule on the question of jurisdiction, see s 37(2)(1)(c) of the AA.

[228] The question of joining several parties in one arbitration is often dealt with in connection with the right of recourse.

on standard terms. Disputes about these standard terms are subject to settlement by arbitration at the Building and Construction Arbitration Court. The general practice is to consolidate disputes arising out of the above standard terms. As the arbitral tribunals have been permanently appointed by the board and not by the parties, there will in practice be no discussion about the proper composition of the arbitral tribunal in case of consolidation.

The question of consolidation also arises in disputes subject to institutional arbitration through the Danish Institute of Arbitration. Its current Rules of Procedure (2008) do not include any joinder authority against a party's objection. Recent case law does not include any examples of an arbitral tribunal having enforced a joinder against a party's objection. New Rules of Procedure of the Danish Institute of Arbitration adopted on 11 December 2012 are due to take effect on 1 May 2013. Under Article 9(1) of the new Rules, the chairmanship of the Institute may permit consolidation of arbitration cases subject to the Rules. Also under Article 9(3) of the new Rules the Arbitral Tribunal may permit one or more third persons to be joined in the arbitration.[229]

Whether a claimant in an arbitration can take over the litigation of claims from other potential claimants against the same respondent depends on an interpretation of the existing arbitration agreement. Unless the agreement explicitly allows a party to litigate claims on behalf of other parties, the claimant may not include such other claims. An arbitration clause in for example a franchise agreement providing that the parties will submit to arbitration "[a]ll disputes, claims, or controversies arising from or relating to" the underlying contract will hardly be construed to the effect that a group of franchisees may demand that their individual claims against their franchisor be consolidated into one arbitration.

[229] Article 9 of the Rules of Arbitration Procedure, effective 1 May 2013, of the Danish Institute of Arbitration reads as follow: "Where a Statement of Claim with a Request for Arbitration is submitted in a dispute between parties already involved in other arbitral proceedings pending under these Rules, the Chairmanship, upon request of a party, may decide, after consulting with the other party and any confirmed arbitrators in all cases, that the new case shall be consolidated with the pending case. The Chairmanship may proceed in the same way where a Statement of Claim with a Request for Arbitration is submitted between parties that are not identical to the parties in the pending case. *Par. 2:* When rendering its decision, the Chairmanship shall take into account all relevant circumstances, including the mutual connection between the cases and/or the parties and the progress already made in the pending case. Where the Chairmanship decides to consolidate the new case with the pending case, the parties to both cases shall be deemed to have waived their right to appoint an arbitrator, and the Chairmanship may revoke the appointment and confirmation of arbitrators and apply the provisions of article 9-13. *Par. 3:* Where one or more third persons request to participate in cases already pending under these Rules or where a party to a pending case under these Rules requests that one or more third persons to be joined in the arbitration, the Arbitral Tribunal shall decide on such request, provided that an arbitration agreement under the Rules covering the third person(s) may exist, and after consulting with all of the parties, including the person or persons to be joined, taking into account all relevant circumstances, including the mutual connection between such third persons and parties and the progress already made in the pending case."

Class Actions and Arbitration Procedures – Hungary

László Kecskés & Lajos Wallacher

1. Overview of the relevant rules

Our question to be answered is the following: is there any form of legal actions in Hungarian law that may be classified as a class action? In order to be able to reply to this question the notion of class action has to be defined as a first step. By defining class actions we try to collect and describe those characteristics that we can use in deciding whether certain institutions of Hungarian law aiming at enforcement of law would amount to a special method of collective redress.

The notion of class action can be derived from the objectives that this creation of law intends to achieve. Effectiveness and desire to economize on available resources are identifiable goals. Class actions are an efficient type of dispute resolution from the viewpoint of parties and courts equally. Efficient in the sense that both parties and courts will be better off if the most possible claims are adjudicated in the fewest possible lawsuits. Plaintiffs can share the costs of litigation if they sue jointly which makes it affordable for them to litigate such small claims the enforcement of which is not worth it because it would be too burdensome in comparison with the achievable gain. At the same time courts can save time and resources if it is enough to establish the facts of the cases and to judge the legal issues for similar cases only once.

Collective enforcement of claims helps to avoid the danger of conflicting decisions and for this reason it is advantageous from the viewpoint of legal certainty. The best possible solution maximizing all of these benefits is the most extreme one – when in a single lawsuit all similar claims are decided, with no exception and finally. Admittedly, the simple pooling of individual claims into a joint lawsuit cannot produce the best possible level of efficiency. To achieve a high level of efficiency the individuality of claims should be removed, in order to make it possible for the court to judge one common, generalized claim based upon the same set of facts and legal rights instead of adjudicating simultaneously different, individual claims. This generalization of claims, however, may come into collision with the principle of private autonomy, especially with its procedural corollaries.

Any collective redress scheme has to strike a balance between these two goals, namely the generalization of claims to enhance procedural efficiency on the one side and to leave enough room for individual law enforcement that could ensure that the principle of procedural fairness is fully respected, on the other.

Bearing in mind the above mentioned intentions and principles surrounding collective redress systems, for this report we use this term in the sense that it encompasses all of those law enforcement methods through which several from each other independent, individual claims are litigated in a single lawsuit in such a way that the procedure is 'something more' than a mere collection of individual claims to be judged simultaneously in one procedure meaning that it generates procedural efficiencies. These efficiencies stem from the simplification of the procedure based upon the generalization, standardization of claims. Due to this process only one claim has to be reasoned, substantiated, opposed, adjudicated etc. which is the most important procedural benefit. As a corollary, potential plaintiffs are not bound to individually pursue their cases, they do not have to participate actively in the litigation, and direct links are weakened between the sole representative and all those who are represented.

In Hungarian law there are several ways of law enforcement that more or less fulfill these criteria. Their common characteristic is that the Hungarian legislator preferred the *actio popularis* model to the class action type of collective redress, which means that there are no special procedural rules for collecting and aggregating similar individual claims and for choosing the representative plaintiff, but instead a third party, typically state organs (authorities) and/or civil organizations are authorized by legislative acts to bring actions on behalf of certain group of persons. These forms of collective redress are separately and differently regulated, each of them is applicable only to a certain type of claims and is attached to a special field of law (e.g. consumer protection) so there is no one common set of procedural rules with horizontal scope that would apply regardless of the rights litigated.

The legislative acts establishing these collective redress mechanisms do not say anything about the question whether they are allowed to be applied in connection with arbitration. For this reason we have to analyze and evaluate all the connecting rules and the underlying principles that may have relevance in reaching conclusions regarding this issue.

1.1. Brief presentation of the national collective redress system

For the sake of completeness, before turning to the genuine collective redress schemes, two sets of rules are worth mentioning, the aims of which are entirely different, but they can be used for aggregating individual claims.

1.1.1. Joinder of parties

The first one is the joinder of parties *(pertársaság)*. Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as CCP) makes it possible for plaintiffs to sue jointly the same defendant before state courts. The rule reads as follows.

Two or more plaintiffs may unite in an action and two or more defendants may be jointly sued if:

- the subject matter of the litigation is a common right or a common liability that can only be resolved in unity, or if the ruling would affect all defendants, even those not appearing in court;
- the claims under litigation originate from the same legal relationship;
- the claims under litigation involve similar cause of action and legal basis, and the same court is recognized to have jurisdiction section 40 notwithstanding with respect to all defendants.[230]

The joinder of parties is allowed at the beginning of the procedure (i.e. plaintiffs may bring their claims jointly) and in the course of the lawsuit as well, which means that further plaintiffs can join the proceedings afterwards.

For the purposes of collective redress point *c)* type joinder of parties can be used, as the claims are independent of each other but similar. So far the courts have not clarified what amounts to 'similar cause of action and legal basis'. It is not surprising because this form of joinder does not alter the procedural position of the parties substantially, and it does not have significant advantages and heavy drawbacks either, so it does not really matter whether it is allowed or not. Claims are judged individually, the only simplification is that it happens in one lawsuit. Any action or omission on the part of either of plaintiffs may not serve the benefit or detriment of other plaintiffs.[231] Co-plaintiffs retain their own right to submit statements (pleadings), to prove relevant facts, and to decide how to conduct their cases. They can authorize the same representative, but it is only a possibility. Even if it is the case, any co-plaintiff can instruct his/her attorney independently of other co-plaintiffs because their legal relationship is based on separate contracts. Co-plaintiffs shall be ordered to share the court costs equally, however, in the event of any major difference in the level of interest among the joined parties court costs shall be shared in proportion to their respective interests. Any costs arising solely in connection with the acts carried by one of the parties during the proceedings shall not be covered by the other parties.[232]

230 Article 51 CCP.
231 Article 53, paragraph 1 CCP.
232 Article 82, paragraph 2 CCP.

This method of joint enforcing of claims falls outside the ambit of what we defined as collective redress. The main reason for this is the fact that claims remain separate and individual, the outcome of the proceedings can be different for them (theoretically it cannot be excluded that one plaintiff wins, but the other loses). The way claims are pursued (legal reasoning, pleadings, evidence offered) can follow different paths. Co-plaintiffs are not freed from the burden of active participation in the lawsuit. The procedural rules of the joinder do not transform the individual claims into one, typical claim.

1.1.2. Assignment

The other legal tool which can be used for aggregating claims is assignment which is regulated in substantive civil law. The Act IV of 1959 on the Civil Code of the Republic of Hungary (hereinafter referred to as Civil Code) stipulates that claims may be transferred to other persons by contract.[233] The assignee subrogates the rights of the assignor (the original obligee under the contract). With the help of assignment claims can be collected, thus one person can enforce a bundle of claims in a single lawsuit against the same defendant. But the claims themselves remain independent and potentially different since they are not merged into one, inseparable, homogenous claim, which ought to be judged uniformly. That's why this solution does not fall under our collective redress definition. Moreover, the viability of this method is doubtful because very complex contractual arrangements would be needed e.g. allocating risks which would generate substantial transactional costs.

Actions instituted by statutorily designated entities (közérdekű kereset)

The only genuine forms of collective redress in Hungarian law are the actions instituted by statutorily designated entities (közérdekű kereset, hereinafter called public action).

It has various subtypes, but the following features are equally common to them:

- the source of the entitlement to commence such actions is the act of the legislator
- the entitled entity brings the action on behalf of others, it enforces not its own claims but others'
- not all types of claims can be enforced in this way, only those that are listed by the relevant acts.

The Civil Code (in its part that contains the general provisions of contract law) makes it possible to institute public action to contest unfair terms of consumer contracts if they constitute part of standard contract terms. The only claim that can be sought is the declaration of nullity. The court may declare the unfair term null and void in favor

[233] Article 328 Civil Code.

of all of the parties with which the party imposing the unfair term has a contractual relationship. Moreover, this type of public action may be launched against any party that publicly recommends the use of any unfair standard contract term or condition that has been defined for consumer contracts and made available to the general public. The court, if it finds the contested contractual term unfair, shall declare it null and void for future purposes and shall ban any further recommendation for use.[234] The organizations (or officials) entitled to launch such lawsuit are appointed by special legislation. Among them we find public entities (e. g. ministers, public prosecutors, authorities), civil organizations[235] and associations of undertakings.[236]

This law enforcement tool serves the purpose of consumer protection. It satisfies the conditions of our collective redress definition, since similar claims of consumers are litigated in these lawsuits. Neither the identity nor the quantity of the consumers is identified in the course of the lawsuit. The affected consumers are those with whom the contested standard contract was concluded. The affected consumers do not participate in the proceedings,[237] not a single procedural step is required on their part. They are not even aware of the pending lawsuit because it is not compulsory either individually or by public announcement to notify them of the lawsuit. Although in its judgment the court may compel the defendant to publish the decision, as a result of which after closing the procedure it becomes possible for the consumers to get acquainted with their rights upheld in the judgment, this rule does not have any bearing on the lawsuit, it merely helps the execution phase.

This system cannot be characterized as opt-in but there is no formal possibility to opt out either. Consumers have got to do nothing to enjoy the benefits of the lawsuit. However, they are not able to get the lawsuit initiated since the entitled entities can excise discretionary power in deciding whether or not to sue. Consumers are not allowed to declare in advance that they do not want to be bound by the judgment. Although they are not granted the right to formally opt out, if an affected consumer subsequently pursues his claim individually, the court will not dismiss the case because of the prior judgment that the public action resulted in. The reason for this is that the conditions of *res judicata* are not fulfilled in this case, since the parties are not identical.

The court is not obliged to examine in the lawsuit whether the plaintiff is able to adequately represent the consumers or the representativeness of the civil organiza-

234 Article 209/B Civil Code.

235 The entitlement to file for legal action is also afforded to all qualified entities established under the laws of any Member State of the European Economic Area with respect to the consumer interest they protect that are included in the list published in the Official Journal of the EU pursuant to directive 2009/22/EC.

236 Article 5 of tvr. 2 of 1978.

237 But they can step in (join) the lawsuit as co-plaintiffs, if the cause of their action and the underlying facts are similar – see the judgment of the Fővárosi Ítélőtábla (publication number: BDT 2005.1137).

tion in relation to the affected consumers. The public law entities are listed by their name in the statute so their entitlement is concrete and unambiguous. As far as consumer organizations or associations of undertakings are concerned, the court may examine their statutes to verify whether it is among their aims to represent the interests of consumers/undertakings.[238] But representativeness is not required and it is not the precondition of the action that their members and the affected consumers be one and the same.

The number of affected consumers is of no relevance so it is not a precondition that affected consumers be so numerous that in the light of it individual actions would be impracticable.

The court does not have to analyze as the prerequisite of commencement of public actions whether the claims sought are identical, homogenous, whether the questions of law or fact are common to the claims of all affected consumers. Partly it is ensured by the fact that only the declaration of the unfairness of the terms and as its corollary the nullity can be sought in these actions. The court should stop at this point because it cannot decide which legal consequences of the nullity should apply. However, the evaluation of the unfairness of the contract terms do not necessarily produce the same result in relation to all affected consumers. The substantive rules of unfairness provide that the unfairness of a contractual term shall be assessed taking into account all the circumstances attending the conclusion of the contract. Obviously, these circumstances may vary from consumer to consumer. Consequently, it could happen that the cause of unfairness is such that individual circumstances matter while in other cases the nature of the alleged unfairness can exclude the relevance of personal peculiarities. However, the similarity of the situation of consumers is not a procedural question to be decided at the outset, but an issue pertaining to the merit of the case. For this reason the entitled entity has to deliberate carefully whether those factors which are relevant in the consideration of unfairness are necessarily the same in relation to all of the affected consumers. If he is not able to prove it, his action will be unsuccessful. On the other side, the court is bound to declare the unfair term null and void in favor of all of the consumers with which the party imposing the condition has a contractual relationship, so it can uphold the claim either for all consumers or for none of them. There are no special procedural rules the aim of which would be to transform the multitude of individual claims into one common claim, which would be the subject-matter of the lawsuit afterward. The similarity of claims is not the prerequisite for public actions, but a circumstance which influences the outcome of the case. If the plaintiff fails to prove the necessary level of similarity of the claims, this failure in itself is enough to lose the case. (The claim may be partly upheld if there is a distinct and identifiable group of affected consumers in relation of whom the unfairness can be equally ascertained.)

238 *See* the judgment of the Supreme Court (Legfelsőbb Bíróság) (publication number: BH 2010.70)

The costs of the public action should be advanced by the plaintiff (i.e. the entity who commenced the action), and the losing party will bear them. However, under the rules of CCP the costs incurred before the commencement of the action are not reimbursable. Thus for example the costs of gathering information, interviewing affected consumers that were incurred by a consumer organization have to be borne by the latter.

In principle the execution of such judgments is not possible, because they are simply declaratory by nature. Nevertheless, they can prove to be self-executing in the sense that consumers can enjoy the benefits of the judgments directly, if it is enough for them that the unfair contract term could not be enforced against them any longer (e. g. because they are freed from an obligation to pay an extra fee for some unwanted services). In this case no enforcement activity is needed. However, if any positive step needs to be taken in order to realize the benefits of nullity (e. g. certain amount of money should be repaid to the consumer), it is up to the defendant whether he is willing to perform voluntarily. Without it, consumers have to commence individual lawsuits to enforce their rights.

The Civil Code provides for similar public actions to contest contractual terms which has been adopted to establish the amount or due date of any interest for late payment contrary to the requirement of good faith and honesty, and if it causes a significant and unjustified imbalance in the parties' rights and obligations arising under the contract to the detriment of the debtor.[239] This rule is applicable to non-consumer contracts as well.

The following type of public actions is also for the protection of consumers. We will present the rules in two steps to make it easier to understand the evolution of the scheme. Before 29 July, 2012 the relevant rules of the Act on Consumer Protection read as follows.[240]The consumer protection authority, any non-governmental organization for the protection of consumers' interests[241] or the public prosecutor may file action against any party to make good substantial harm caused to consumers or to protect a wide range of consumers even if the identity of the injured consumers cannot be established. In its judgment the court may authorize the party enforcing the claim to publish the judgment in a national newspaper at the cost of the infringing party. The infringing party (defendant) shall satisfy the claims of the injured consumer in accordance with the judgment. This shall not effect the right of the consumer to have his claims enforced against the said infringing party in accordance with the provisions of civil law.

239 Article 301/A Civil Code.
240 Act CLV of 1997, Article 39.
241 The entitlement to file for legal action is also afforded to all qualified entities established under the laws of any Member State of the European Economic Area with respect to the consumer interest they protect that are included in the list published in the Official Journal of the EU pursuant to directive 2009/22/EC.

This public action scheme is very similar to that of the Civil Code therefore we highlight only those provisions which are different.

There are less entitled public entities that can commence such lawsuits. Moreover, the act defines on which consumer organizations is conferred the right to institute public action. These are the following: organizations established under the act on the right of association, whose objective specified in its statutes is the protection of consumer interests, which has been operating for at least two years and has at least fifty members who are natural persons, including the alliances of such non-governmental organizations.[242]

What is a more significant difference is the condition that this public action is permitted on behalf of a wide range of consumers or against an undertaking that caused substantial harm to consumers. The exact meaning of 'wide range' (numerosity requirement) and 'substantial harm' is not defined, and the case law of courts has not clarified it so far. Nevertheless, two Supreme Court's judgments shed some light on important details. The first one[243] emphasized that it is the number of the affected consumers that matters, and not the number of consumers whose interests are represented (viewpoints are presented) by the plaintiff consumer organization. Also irrelevant is whether the action is beneficial or not to those consumers whose interests (viewpoints) are not presented by the plaintiff. What matters is which consumer contracts are in breach of law. In the other case[244] the Supreme Court identified prevention as an implied precondition that public actions have to fulfill, which means that no action is allowed against illegal practices that no longer exist. When the numerosity requirement was interpreted, the Supreme Court was silent on the question whether – from the viewpoint of both parties and courts[245] – it would be practically viable to enforce the claims individually instead of public actions. Therefore it seems that this balancing excercise is not inherent in the test.

As far as the 'substantial harm' condition is concerned, no case law has been reported. It seems that this phrase and the 'wide range of consumers' are synonyms. The different words are meant to refer to different types of claims: the notion of protection of (the wide range of) consumers covers injunctive reliefs, while making good (substantial harm) means compensatory damages.[246]The hardly negligible

242 Act CLV of 1997, Article 2, point e).
243 Publication number: BH 2004. 108.
244 Publication number: BH 2009. 246.
245 Consumers compare the costs of litigation with the attainable benefits. Courts worry about available resources needed to administer a multitude of cases.
246 Literal interpretation would suggest that by stipulating this condition the legislator's aim was to permit public actions if the number of concerned consumers is not too large, but the aggregated amount of claims is huge so the number of the affected consumers is indifferent, the numerosity requirement is not implied in it. We reject this interpretation as being contrary to the basic rationale of any collective redress system: small claims should be aggregated to be worth litigating them, while significant claims can be profitably enforced through individual actions. (To reach

rationale behind these conditions is to circumscribe the discretionary power of public entities because it is desirable that they should not devote public resources to the protection of individual, particular interests.

The claims that may be litigated in this way are almost unlimited, since the potential scope of the terms used by the legislator is very broad (protection, harm). However, their interpretation is not straightforward because they are not customary in civil law, while the actions are to be adjudicated by civil courts. In our opinion there are no reasons for excluding any civil law remedy from the actionable claims, so contractual claims or claims for damages are equally justiciable. In reality the limits to the types of possible claims are set by the implied requirement of similarity/homogeneity which stems from the collective nature of the action. The whole group of claims should be judged in the same way so the evaluation could not depend on individual circumstances, the questions of laws and facts should be the same in relation to all of the affected consumers. For example, in case of breach of contract the replacement of the defective product may be sought under the Civil Code which is a more suitable claim for public action than a claim seeking the recovery of damage sustained due to physical injury caused by the defective product.

Regarding the opt-in or opt-out character of this public action the findings of the analysis carried out above hold true in this case as well (it can be summed up as opting in is not necessary and opting out is impossible). In connection with this public action the act expressly stipulates that individual actions are not excluded, they may be pursued either parallel with the public actions or subsequently (we came to the same conclusion by way of interpretation in relation to the public actions regulated in the Civil Code).

The defendant has to satisfy the claims of the affected consumers in accordance with the judgment. Since any type of claims may be enforced by this tool, the necessity of the execution of judgments may occur. Unfortunately, there are no special rules which would bridge the gap between the collective judgment and the individual claims for execution (e.g. the execution of monetary claims would require the knowledge of the personal account numbers of the affected consumers; for this reason their individual involvement seems indispensable, though the commencement of the execution procedure by the public enforcer is conceivable.)

The law has changed as of 29 July, 2012 in the following way. There are two types of public actions under the Consumer Protection Act. The first type can be initiated by consumer protection authorities or associations for the protection of consumers' interests. The details of this scheme are identical with the Hungarian Competiton Authority's public action model (see below). The second type of public action can be

substantial level of harm the individual claims should be small and numerous or few but considerable.)

commenced by public prosecutors or associations for the protection of consumers' interests on condition that an illegal (the nature of illegality is not specified) action has been committed by an undertaking and this action has affected a wide range of consumers or has caused substantial harm. So the „wide range of consumers" and „substantial harm" conditions remained unchanged but the contents of the possible actions (the actionable claims) have „disappeared". Nevertheless, it seems probable that any type of civil law claims may be pursued in this way. Moreover, the plaintiff may also demand the termination of infringement and the prohibition of the offender from any further violation of the law („cease and desist order") or the restoration to the original condition/state (in integrum restitutio). The rationale for these changes is clear to some extent. It is understandable that consumer protection authorities should litigate the civil law consequences only of those rules, the enforcement of which falls under their competence. But it seems unclear why it is necessary to grant consumer associations rights to use civil suits for public type law enforcement.

The next type of public action is that one which may be commenced exclusively by the Hungarian Competition Authority (Gazdasági Versenyhivatal, hereinafter referred to as GVH). Its scope is rather narrow, but the rules are the most elaborated ones so it is worth scrutinizing them in detail.

The GVH may file for civil action on behalf of consumers against a business entity engaged in any infringement of the Competition Act[247] or the Act on the Prohibition of Unfair Commercial Practices, [248] falling within the competence of the GVH, where such illegal action results in a grievance that affects a wide range of consumers that can be established relying on the circumstances of the infringement. The GVH shall be entitled to bring such action only after the opening of its proceedings in which it investigates the infringement in question.

Where, with respect to the consumers affected by the infringement, the legal grounds for the claim and the amount of damages, or the overall contents of the claim in the case of other claims, can be clearly established irrespective of the individual circumstances of the consumers affected by the infringement, the GVH may request the court to award such claims and order the undertaking in question to satisfy these claims, or failing this, to request the court to declare the infringement covering all consumers indicated in the claim. If according to the court's decision the violation has been established covering all consumers indicated in the claim, the consumers affected may file actions against the undertaking and are required to verify only the amount of damages and that the damage is the direct result of such infringement.

247 Act LVII of 1996. The core provisions are the prohibition of cartels and abuse of dominance; these rules are copies of article 101 and 102 of TFEU.

248 Act XLVII of 2008 which transposes Directive 2005/29/EC.

The court's decision shall specify the consumers who are affected by the violation, and therefore are entitled to demand satisfaction based on the judgment, and shall determine the data required for their identification. In its ruling the court may authorize the GVH to publish the court's decision in a national daily newspaper at the expense of the infringer, or to make it available to the general public by means consistent with the nature of the violation. If the court's decision, apart from having established the violation, also contains a clause ordering the undertaking to provide satisfaction for a specific claim, the infringer shall be required to satisfy the claim of the consumer on whose behalf the judgment was awarded. If the consumer's claim is not satisfied voluntarily, the consumer may request execution. The court shall verify the consumer's entitlement in its proceedings for the issue of an enforcement order.

The public action of the GVH is without prejudice to the consumers' right to bring civil action independently against the infringer.

The observations set forth above are also valid also for this public action. So only the differences will be shown and explained below.

The action may be commenced on behalf of consumers.[249] The legal basis of action has to have connection with the infringement of the Competition Act or the Act on the Prohibition of Unfair Commercial Practices. The GVH has power to investigate the infringements of these acts, which have public law character. The violation of these public law instruments sometimes generates civil law remedies, but not always. For example cartels are declared illegal, and the agreements restrictive of competition are null and void, so civil law claims can be derived from it. Abuse of dominance may lead to damages actions. On the other side, unfair commercial practices (e. g. misleading advertising) not necessarily make the subsequent contracts (which were entered into under the impact of the deceiving statements) null and void because the civil law concept of deception have different rules.

The affected consumers have to be numerous, which fact can be established relying on the behavior of the defendant (who committed the infringement). Hypothetically, all types of civil law claims are enforceable by this lawsuit. The act expressly states (what we deduced in the above mentioned cases) that in order to be upheld by the court the contents of the claims should be established irrespective of the individual circumstances of the consumers affected by the infringement. It is conceivable that in some cases the similarity of the circumstances of the affected consumers can be established only to some extent therefore to these cases a special rule applies that makes it possible to uphold the collective claims only in part. In this way the procedure can be split into two parts: aggregated claims may be pursued until

[249] Victims of violations of competition rules can be undertakings as well, but their claims may not be enforced by public actions.

the point where similarity ceases to exist, subsequently the procedure has to be separated, the enforcement can continue only in the form of individual actions. This rule is needed to overcome the obstacles posed by the general rules of civil procedure which permit only 'full' claims, meaning that it is not allowed to stop at halfway and to claim only declarations (e. g. declaration of breach of contract without remedies). Finally, the execution is helped by special provisions and certain practical problems are solved.

The GVH has not made use of this instrument so far, so no case has been reported.

We can find other versions of public actions in Hungarian law, which have their origin in the above-specified models. For example the scheme of GVH's public action is adapted to the financial sector where the Hungarian Financial Supervisory Authority (Pénzügyi Szervezetek Állami Felügyelete) is the entitled entity.[250] The Act on Equal Treatment and the Promotion of Equal Opportunities[251] gives right to the public prosecutors, the Equal Treatment Authority and civil organizations to commence public actions if the requirement of equal treatment is violated (or there is a risk that it might be violated), if the violation (or the risk of it) affects large group of persons whose identity cannot be detected. Under the rules of the Act on the Protection of Environment in the event of endangerment to the environment, the prosecutor is entitled to file a lawsuit to impose a ban on the activity or to elicit compensation for the damage caused by the activity endangering the environment.[252]

In summary, we can highlight the following features of the public actions of Hungarian law.

The entitled entities – public authorities and civil organizations – are appointed by law. Only sectoral provisions exist, there is no one common set of rules. We can meet with this procedural instrument typically in those fields of law where one of the parties is deemed 'weaker' e. g. consumer protection, standard contract terms.

The adequacy of representation is not to be examined since it is decided by the legislator in advance once and for all. However, false legislative decisions could not prove detrimental because the public actions are without prejudice to the individual enforcement actions.

The claims that may be litigated through public actions vary widely, sometimes all civil claims, in other cases only one of them (e. g. declaration of nullity) may be sought.

250 Act CLVIII of 2010.
251 Act CXXV of 2003.
252 Act LIII of 1995.

This system cannot be characterized as opt-in, but there is no formal possibility to opt out either. Those persons, on behalf of whom the action is commenced, have to do nothing to enjoy the benefits of the lawsuit. On the other side, they have no power to get the public action initiated. They are not allowed to declare in advance that they do not want to be bound by the judgment. The affected persons do not participate in the lawsuit at all, not a single procedural step is required on their part. The individual actions are not excluded, they may be pursued either parallel with the public actions or subsequently. This solution is in accordance with private autonomy (no one's case should be decided in a lawsuit finally without one expressly consenting to it) and procedural fairness (no one's case should be decided in a lawsuit where one had no possibility to present their case), and is beneficial to the affected persons, but weakens the legal certainty and predictability for the defendant who could not know how many claims it will have to face in the future. Moreover, the possibility of conflicting decisions is a real danger.

The number of the represented persons is not really important therefore it is not thoroughly examined. In those cases where it matters, the attention is rather focused on the public entities (they should represent genuine public interests) than on the impracticability of individual lawsuits.

The affected persons do not have to bear the costs of the lawsuits and they do not incur any financial risk. At the same time, the usefulness of the actions can be slight, due to the practical problems of execution.

Since the entitled entity enforces other's rights, winning of the case does not bring direct monetary gains to it. Therefore there is no financial incentive for it to litigate, which makes abuses less probable.

The similarity/homogeneity of claims is not a procedural precondition for commencement of public actions, but a question pertaining to the merits of the case.

Finally, it is worth mentioning that in the spring of 2010 the Hungarian Parliament adopted a bill which would have incorporated general provisions for class actions into the Civil Procedural Code. The President of the Republic did not sign the bill, instead sent it back to the Parliament for reconsideration. The explanation for his step was that the introduction of such an important procedural institution affecting the access to justice would require much more unambiguous rules and a thorough impact assessment. The reconsideration failed because a new Parliament was elected in the meantime.

2. Collective redress and arbitration

2.1. Restrictions on the possibility to conduct class arbitration

The conduct of the arbitration in a collective manner is a question of procedure. In the Hungarian law arbitration is regulated by the Act on Arbitration[253] (hereinafter referred to as Arbitration Act). The Arbitration Act applies when the place of arbitration is in Hungary.

The source of rules of procedure applicable to arbitration is twofold: the Arbitration Act and the agreement of the parties (the obligatory character of the latter is established also by the Arbitration Act). Where the Arbitration Act contains provisions to permit the parties to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an organization, to make that determination. Where this act contains provisions to permit the parties to agree on a certain issue, or if it refers to an agreement of the parties in any other way, any arbitration rules stipulated by the parties shall be construed as such an agreement.[254] Due to these provisions the rules of proceedings of permanent arbitration institutions may have relevance in answering the question whether class arbitration is allowed in Hungary. The most prestigious arbitration institution in Hungary is the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry. The Arbitration Act grants exclusive jurisdiction to this Arbitration Court in international matters. Another important permanent arbitration institution is the Money and Capital Markets Arbitration Court which was established by the Capital Markets Act.[255] The third one is Arbitral Tribunal for Energy established by the Act on Electric Energy[256] (its jurisdiction was broadened by the Act on Natural Gas).[257]

The Arbitration Act is silent on the issue of class arbitration, neither permitting nor prohibiting it. So are the rules of proceedings of the above mentioned three arbitration institutions.

In the following section we will analyze the question whether the only form of collective redress of Hungarian law (public action) is arbitrable. This question can be divided into two sub-questions:

- if the parties have agreed upon arbitration, does the scope of the arbitration clause cover public actions?

253 Act LXXI of 1994.
254 Article 9 Arbitration Act.
255 Act CXX of 2001. Some cases may only be conferred for arbitration to this institution, including the cases deemed international under Arbitration Act. Exclusivity obtains only with regard to domestic arbitration.
256 Act LXXXVI of 2007.
257 Act XLII of 2003.

- do the state courts have a monopoly on adjudicating public actions?

2.1.1. Does the scope of arbitration clauses cover public actions?

By this question, in essence, we ask whether the arbitration agreement binds the entitled entity.

It is a principle of arbitration that parties cannot be forced to arbitrate a dispute unless they agree to do so. On the other side, if they agree upon arbitration, they are bound by this agreement. A third party may be bound by the arbitration agreement if the contract[258] wherein the arbitration clause was incorporated is transferred (assigned) to them. In case of transfer by contract the obligation to arbitrate retains its consensual nature, because the assignee can freely decide whether or not he/she intends to enter into the contract. The right and duty to arbitrate is automatically transferred together with the substantial rights and duties of the underlying contract.[259] As a result, the assignee may bring action before the arbitral tribunal to enforce its own substantial rights. It is in his/her power to decide whether or not to commence proceedings.

The situation in case of public actions is completely different. The entitled entity brings action on behalf of others, so the owners of the substantial rights and the plaintiff (the 'owner' of procedural rights) are different persons. Moreover, the source of its entitlement to litigate is the act of the legislator, and not the will of the owners of the contractual rights. Therefore this entitlement is of public law character rather than civil law nature. Having regard to these circumstances, it is questionable whether the will of the parties expressed in the arbitration agreement as to the way of dispute resolution may influence the enforcement powers of the entitled entities.

At first sight it seems logical to answer this question negatively, saying that the entitlement comes not from the parties, consequently they have no power to affect it. On the other hand, it is also true that the entitled entities enforce rights arising from the contract, so their actions are apparently affected by the expressed will of the parties. If we look at the problem from this angle we could not find any legitimate reason for distinguishing between the procedural and substantial effects of the agreement of the parties, it would be contradictory to say that the substantive terms and conditions of the contract bind the entitled entity (since it may enforce nothing else but them), but the dispute resolution provisions of the contract have no such effect.

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258 Under the Civil Code in force the contract as such is not transferable, only the rights arising from it are assignable; the delegation of duties is also possible.

259 It was confirmed in several published awards of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry – see VB/96150, VB/00188, VB/97169.

In a more general fashion our question can be formulated as follows: does the legislator have a cause to restrain the freedom of parties to choose the forum for the collective resolution of their dispute when the same dispute individually arbitrable?

We cannot find justification for excluding the class arbitrability of those matters that are arbitrable individually.

So far the courts have not ruled on this issue. Nevertheless, one judgment[260] of the Supreme Court may be authoritative by way of analogy. In this decision the Supreme Court said that the arbitration clause cannot be enforced against a person who initiates action for recovery of a claim. This type of lawsuits may be initiated by the judgment creditor against third parties to enforce the judgment debtor's claims. The Supreme Court reasoned that to the underlying contract (on which the claim is based) the parties remain unchanged, that's why the arbitration clause therein does not bind the person who commences the action for recovery. Unfortunately, the Supreme Court did not address the issue that in this case how it can be possible for him to enforce the rights arising from the contract, or what is the legal basis for distinguishing between those provisions of the contract which are applicable in this lawsuit and those that are not.

In the light of the foregoing, we could not give definite answer to our question. The arbitrability of public actions is a controversial issue, where convincing arguments support both viewpoints. In our view the rules of enforcement of claims organically connect to the substantive rules of civil law, therefore the parties' right to shape them should be recognized. However, by granting enforcement tools to third parties the legislator intervenes in the private relationship which act has undoubtedly a public law character, and the entitlements granted by public law are not such that may be freely disposed of by contract. Therefore it is a mixed situation.

Nevertheless, we are in favor of construing the law in such a way that permits the arbitrability of public actions, because there are no such special rules in Hungarian law that would set additional limits to agreements concerning the way of enforcement in comparison with the substantive rights and duties. Needless to say that the class arbitrability would require similar arbitration clauses incorporated in the contracts.

Finally, it has to be emphasized that the arbitrability of public actions does not depend on the compatibility of public actions with the principles of civil law (private autonomy), because the legislator decided this question by allowing public actions. Therefore the only decisive factor is that where the boundaries of the scope of the arbitration clause are delineated.

[260] Publication number: BH 2003. 373.

2.1.2. Do public actions fall under exclusive jurisdiction of state courts?

The Civil Code's basic rule on enforcement of civil claims reads as follows. Unless otherwise stipulated by law, these rights shall be enforced in the court of law. Parties may resort to arbitration instead of litigation if at least one of them is professionally engaged in an economic activity, if the legal dispute is in connection with that activity and if the parties are able to freely dispose over the subject of the proceeding.[261] The Arbitration Act confirms this rule in the following way. Instead of the court of law, disputes may be settled by way of arbitration if:

- at least one of the parties is professionally engaged in business activities and the legal dispute arises out of or in connection with this activity; furthermore
- the parties may dispose freely of the subject-matter of the proceedings; and
- arbitration was stipulated in an arbitration agreement.

In the absence of the requirement set out above, arbitration may be stipulated nonetheless if permitted by law.

These rules make arbitration an alternative of equal ranking to the litigation before state courts. The acts and regulations when they stipulate provisions concerning enforcement of certain claims mention 'courts' in general. But this must be understood as comprising arbitration as well due to the general rules cited above. Therefore only the use of the word 'court', properly construed, does not exclude arbitration. Such purpose of the legislator has to be stated expressly. For this reason the fact that acts mention 'courts' when they regulate public actions is not enough to exclude the arbitrability of these actions.

Neither the personal features of the entitled entities make the jurisdiction of state courts exclusive. It is a well-established principle that state organs are not immune from arbitration if the disputes concern their commercial activity. Undoubtedly, the claims that can be litigated in public actions are civil by nature.

It is worth mentioning that the Act on National Assets[262] generally prohibits arbitration in relation to 'national assets'. But the claims enforceable through public action fall outside the notion of national assets, since the entitled entities enforce other persons' claims.

Finally, we cannot identify a single circumstance that would make the adjudication of public actions by arbitration impossible in practical sense. It is true, as we explained above that the public actions are quite under-regulated, especially the phase of execution, but the practical problems are common to state litigation and arbitration.

261 Article 7, Civil Code.
262 Act CXCVI of 2011, Article 17 paragraph 3.

To sum up, there are no grounds for establishing the exclusive jurisdiction of state courts to adjudicate public actions.

2.1.3. Do the rules on public actions form part of lex fori or lex causae?

This question is relevant in cross-border (international) cases. Under the rules of private international law the law applicable to contracts is the law that the parties have chosen. In absence of their choice the rules of private international law determine the law applicable. If the rules pertaining to public actions form part of the *lex causae*, this method of enforcement becomes possible if the Hungarian civil law is the law of the contract. If the rules that make it possible to commence public actions fall outside of the law of the contract, they are allowed only in cases when the *lex fori* is the Hungarian law.

In Hungary this question is to be decided in accordance with the rules of the following pieces of legislation: regulation (Rome I) on the law applicable to contractual obligations[263], regulation (Rome II) on the law applicable to non-contractual obligations[264], Act on Private International Law[265]. None of them mentions expressly this matter. Nevertheless, in our view the rules pertaining to the way of enforcement of claims, as well as rules that regulate who and on behalf of whom may enforce civil claims in principle form part of civil law. On the other hand, the rules of procedure fall under the scope of public law. The rules that grant standing to others than the owners of the rights have a mixed character. It also has to be borne in mind that public entities may exercise their power only in their own territory, so it is hardly conceivable that it would be allowed for them to enforce civil claims in foreign jurisdictions.

2.1.4. When does the scope of the arbitration clause cover class arbitration?

Previously we examined whether public actions may be commenced before arbitral tribunals. We came to the conclusion that it seems conceivable, in theory it cannot be excluded. Of course, the parties' consent to arbitrate (similar arbitration clauses in a good many agreements of the same defendant) is an inevitable prerequisite. In the following section we analyze the question of what type of arbitration clause would be needed to cover the public actions as well.

The parties can freely decide that they submit their dispute to arbitration. They are allowed to arbitrate some kind of disputes, but not others. So it is possible that they divide their disputes into two categories: one group they refer to arbitration, the other to state courts. There is no such a rule which would make it compulsory to

263 593/2008/EC, Article 12.
264 864/2007/EC, Article 15.
265 Tvr. No. 13 of 1979, Article 29.

handle all disputes in the same manner. That's why in principle it is possible that the parties agree to arbitrate the individual actions, while they keep the adjudication of public actions in the domain of state courts.

It is self-evident, if the arbitration clause expressly refers to public actions, its scope covers it. The real question arises when the arbitration clause is silent on this issue. For example, the Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry offer the following standard arbitration clause:

'The parties agree that all disputes arising from or in connection with the present contract, its breach, termination, validity or interpretation shall be exclusively decided by the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Budapest in accordance with its own Rules of Proceedings.'

Literally interpreted, this clause covers all type of actions, among them the public actions. Nevertheless, until it is confirmed in the case law of courts that public actions may be pursued before arbitral tribunals, any party to the contract can argue – referring to the general rules of interpretation[266] – that they could not have wanted that public actions be adjudicated by arbitral tribunals, because they had not been aware of the existence of this possibility at the time of the conclusion of the contract. Probably, the potential defendant (e. g. an undertaking using unfair standard terms in its consumer contracts) would have good cause for such reasoning, since the aggregation of consumer claims would threaten with huge pecuniary losses, and the lack of appeal would increase the risk. For the plaintiffs (e. g. consumers) the class arbitration would not entail additional risk because public actions are without prejudice to the possibility of individual enforcement.

2.1.5. Does the Constitution allow waiver of the right to an effective remedy before a court?

If the parties agree on one form of dispute resolution it may have exclusionary effect on the others. Parties may have the intention to exclude the collective ways of enforcement of claims, in Hungary the public actions as the only available statutorily stipulated form of collective redress. This type of agreement would constitute a waiver of rights to use some forms of enforcement of claims.

Having regard to the fact that the entitled entities have the right to commence public actions on behalf of other persons, they may enforce in this way not their own claims but others'. Therefore the possibility of waiver has to be examined in

[266] In the event of a dispute, the parties shall, in light of the presumed intent of the person issuing the statement and the circumstances of the case, construe statements in accordance with the general accepted meaning of the words.

relation to the represented persons, on behalf of whom the public action may be commenced, and not from the viewpoint of the entitled entities. So we can formulate the question in the following way: are the persons, on behalf of whom the public actions may be pursued, allowed to waive this right? The possibility of waiver or the exclusion of it requires explicit regulation, that is to say, which one applies in default of express statutory provision?

Access to courts is a fundamental right in the Hungarian law. The Hungarian Constitutional Court in one of its early decisions[267] declared that this fundamental right has a negative side as well, which is the right to waive of the right to access to courts. Everybody is free not to resort to courts. Moreover, having regard to the principle of the freedom of contract, the waiver can be incorporated into a contract in advance, so the abstention from commencement of lawsuit is not the only possible form of this negative right. Parties avail themselves of this negative right when they agree to resort to arbitration. In this way they waive of the fundamental right to access to courts. The effects of the waiver may be constrained by law (e. g. in case of arbitration the limited possibility of court review of awards protects the interests of the parties).

On the other hand, it also has to be borne in mind that the Hungarian Constitutional Court declared unconstitutional the limitless statutory entitlement of the public prosecutors to commence lawsuits on behalf of private individuals to protect their rights. The Court argued that this general entitlement violates the private autonomy of individuals, it qualifies as excessive intervention in private relationships, therefore unacceptable. The parties should have control over their lawsuits, they should be the masters oftheir own cases, it is the procedural corollary of the fundamental principle of private autonomy.[268]

It follows from the foregoing that from the perspective of constitutional law the waiver of the right to access to courts is allowed. This negative right is not limited by the Constitution. On the other hand, laws that make it possible for public organs to intervene in private relationships (e. g. by instituting actions on behalf of others) fall under thorough constitutional scrutiny, as being contrary to the constitutionally protected private autonomy.

Consequently, in principle the parties are allowed to exclude public actions by contract. This waiver is not generally prohibited. The right – granted to public entities and civil organizations – to intervene in private contracts is not such an absolute one which should prevail over private autonomy.

267 1282/B/1993 AB resolution.
268 1/1994. (I. 7.) AB resolution.

2.1.6. Are clauses excluding public actions or submitting disputes to class arbitration unfair?

In Hungarian law there are no special set of rules for contracts of procedural nature (i.e. contracts dealing with enforcement issues and the conduct of proceedings). However, the general rules relating to contracts which limit the parties' contractual freedom may have relevance for us. Especially, the rules prohibiting unfair terms in contracts may be applicable. Therefore below we review the provisions and case law pertaining to unfair terms to verify whether clauses that exclude public actions or submit them to arbitration may be considered unfair.

The unfairness of contract terms is defined in the Civil Code as follows. A standard contract condition or a contractual term of a consumer contract which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith and honesty, it causes a significant and unjustified imbalance in the parties' rights and obligations arising under the contract, to the detriment of the party entering into a contract with the person imposing such contractual term or condition. The unfairness of a contractual term shall be assessed, taking into account the nature of the services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.[269]

Firstly, it must be emphasized that these rules are applicable only in relation to standard contract conditions or a contractual term of a consumer contract which has not been individually negotiated. As far as cases suitable for class arbitration are concerned, this condition is probably fulfilled in the majority of cases because class arbitration requires homogeneity in arbitration clauses and in substantive terms and conditions of the contract as well, which we typically call standard contract.

The notion of unfairness is defined in quite general terms so it is capable of covering almost every type of arrangements. For the same reason, the case law of the courts is of paramount importance. It should be mentioned that a government decree[270] specifies some concrete unfair terms. Among them we can find one which prohibits excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions.[271] However, this provision does not apply to arbitration regulated by the Arbitration Act, which we are dealing with here.

269 Article 209, Civil Code.
270 Government Decree No. 18/1999. (II.5.) Korm. rendelet.
271 This rule transposes point (q) of the annex attached to the Directive 93/13/EEC on unfair terms in consumer contracts.

The rules of unfairness in the Civil Code originate from the Directive 93/13/EEC on unfair terms in consumer contracts. Therefore the case law[272] of the European Court of Justice is to be followed when we interpret this notion. In none of these cases did the European Court of Justice declare an arbitration clause unfair,[273] but in relation to clauses which conferred exclusive territorial jurisdiction on specific courts it used such reasoning that may be applicable to arbitration clauses as well. The Court summarized its relevant judgments as follows.'As regards a term which is included, without being individually negotiated, in a contract between a consumer and a seller or supplier within the meaning of the Directive, where it confers exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, the Court has held, in paragraph 24 of *Océano Grupo Editorial and Salvat Editores*, that it follows that such a term must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

It must be observed that the term which the national court is examining in the main proceedings, like a term whose purpose is to confer jurisdiction in respect of all disputes arising under the contract on the court in the territorial jurisdiction of which the seller or supplier has his principal place of business, obliges the consumer to submit to the exclusive jurisdiction of a court which may be a long way from his domicile. This may make it difficult for him to enter an appearance. In the case of disputes concerning limited amounts of money, the costs relating to the consumer's entering an appearance could be a deterrent and cause him to forgo any legal remedy or defence. Such a term thus falls within the category of terms which have the object or effect of excluding or hindering the consumer's right to take legal action, a category referred to in subparagraph (q) of paragraph 1 of the Annex to the Directive (see *Océano Grupo Editorial and Salvat Editores*, paragraph 22).

In addition, such a term enables the seller or supplier to deal with all the litigation relating to his trade, business or profession in one court, which is not the one within whose jurisdiction the consumer lives, which makes it easier for the seller or supplier to arrange to enter an appearance and makes it less onerous for him to do so (see, to that effect, *Océano Grupo Editorial and Salvat Editores*, paragraph 23).'[274]

272 *See* cases C-243/08, Pannon GSM Zrt. v. Sustikné Győrfi Erzsébet, C-240-244/98, Océano Grupo Editorial and Salvat Editores, C-137/08, VB Pénzügyi Lízing Zrt. v. Schneider Ferenc, C-40/08, Asturcom Telecomunicaciones v. Cristina Rodríguez Nogueira, C-472/10, Nemzeti Fogyasztóvédelmi hatóság v. Invitel Távközlési zrt.

273 The ECJ in preliminary rulings typically determines only the circumstances to be taken into account, but does not judge the unfairness of the clause.

274 Case C-137/08, VB Pénzügyi Lízing Zrt. v. Schneider Ferenc, points 53-55.

Having regard to the cited decisions of the European Court of Justice, it is highly probable that the unfairness test applies to arbitration clauses as well.[275] The criteria which we must apply when examining the unfairness of a specific contractual term encompass all difficulties the consumer may face due to this clause, e. g. deterrent effects of costs to be incurred. Undoubtedly, the exclusion of public actions adversely affects consumers, simply because these actions have only advantages for them (no restraint stems from these actions at all).[276] Therefore the total exclusion of public actions seems unacceptable. On the other hand, referring public actions to arbitration by contract may be justified. It also has to be borne in mind when examining the disadvantages of class arbitration from the viewpoint of consumers that consumers do not participate in the proceedings, they incur no costs, they do not have to travel etc. The procedure burdens the entitled entities. Finally, in our view the inherent features of arbitration (e.g. lack of appeal) may not be considered as drawbacks when the unfairness test is applied because it is statutorily recognized that arbitration is of equal ranking in comparison with court litigation.

In addition, any contractual term in standard contracts relating to arbitration should comply with that rule of the Civil Code which provides that the other party shall be explicitly informed of any standard contract conditions that differ substantially from the usual contract conditions, the regulations pertaining to contracts, or any stipulations previously applied by the same parties. Such conditions shall only become part of the contract if, upon receiving special notification, the other party has explicitly accepted it.[277] The Supreme Court regarded in its judgments[278] arbitration clauses as contract conditions that differ substantially from the usual contract conditions, therefore without special warning and explicit acceptance they do not become part of the contract.

2.1.7. Other forms of collective redress

In theory it seems possible that the parties work out special set of contractual rules for class arbitration. Also the arbitration institutions may elaborate such rules, and the parties may refer to them in arbitration clauses. Obviously, these clauses should be incorporated into standard contracts, since these are capable of creating a class the members of which would have similar rights and duties. Paradoxically, the undertaking that uses the standard contract would have the capability to elaborate these clauses, but the other parties (e. g. consumers) would be more interested in it. Nevertheless, the undertaking might have strong incentive to do so if it could

275 Rules of unfairness apply to non-consumer standard contracts as well. In this sphere the rulings of the ECJ that interpret the directive are not authoritative, though the courts probably would follow them.

276 The evaluation would be more complicated if public action had some restrictive effect on the consumer's enforcement possibilities (e. g. limits to opting out).

277 Article 205/B, paragraph 2, Civil Code.

278 Publication number: BH 2001. 131 and EBH 2003. 875.

substitute a more burdensome enforcement tool for class arbitration. However, the substitutability is influenced by the above mentioned unfairness test, so if the undertaking tried to replace public actions with its own class arbitration model, it would be difficult to create a scheme which would not be less beneficial to consumers than public actions. Therefore the feasibility of this model is questionable.

2.2. The procedure

The Arbitration Act stipulates that (subject to the provisions of the Act), the parties may freely agree on the rules of procedure to be observed by the arbitration tribunal, or they may stipulate the use of the rules of procedure of another standing arbitration tribunal. Failing such agreement the arbitration tribunal may determine the rules of procedure at its own discretion, within the framework of this act.[279]

If the parties were allowed to refer public actions to arbitration, the rules of proceedings should be determined by the parties or the arbitration institution or the arbitrators. The statutory rules of public actions do not regulate the conduct of proceedings, so the risk of collision is not real. The public action scheme is based on the assumption that a single, aggregated claim is enforced by one plaintiff, which makes the procedural situation equal to ordinary lawsuits. There are no special rules for opting in or opting out which would require adaptation in case of class arbitration.

In case of class arbitration elaborated by the parties or third parties, e. g. arbitration institutions (we can call them self-regulated class arbitration) the parties would be allowed to create special procedural rules. In order to enhance efficiency they should create a model which is more than a mere aggregation of individual claims. For this reason they should simplify the procedure (e. g. representation, right to adduce evidence, notifications). But the Arbitration Act requires the equal treatment of the parties, providing that in the course of arbitration proceedings the parties shall be afforded equal treatment, and each party shall be given the opportunity for presenting his case.[280] The application of this rule may not be excluded by contract. Therefore any effort targeted to simplify the procedure which at the same time would limit the individuals in presenting their cases, would fall foul of this basic rule.

The Supreme Court ruled that if the parties in standard contracts create such procedural rules which derogate from the Arbitration Act in restrictive manner, these conditions will only become part of the contract if, upon receiving special notification, the other party has explicitly accepted it.[281]Finally, the following ECJ ruling indirectly affects the procedure. The unfairness of arbitration clause has to

279 Article 28, Arbitration Act.
280 Article 27, Arbitration Act.
281 Publication number: EBH 2007. 1624.

be examined ex officio by the reviewing court, notwithstanding the fact that the consumer has not pleaded the unfairness during the arbitration proceedings.[282] Therefore it is advisable for the arbitral tribunal to examine the unfairness also on its own motion to avoid the possibility of setting aside.

2.3. Settlement

The Arbitration Act permits settlements. If during arbitration proceedings the parties reach a settlement, the arbitration tribunal shall terminate the proceedings by way of a ruling. If requested by the parties, the arbitration tribunal shall fix the settlement in the form of an award under the agreed terms, provided that it finds the settlement in compliance with the law. An award under agreed-upon terms has the same effect as that of any other award made by the arbitration tribunal.[283] As far as public actions are concerned, the right to settle is unrestricted and the public entities have the same discretionary power to close the procedure by way of settlement as any other plaintiff has.

2.4. Court review afterwards

Decisions of an arbitration tribunal may not be appealed; however, a request for having the award set aside may be requested from the court of law for the reasons listed below.

The party, furthermore any person who is affected by the award, may file for action – within sixty days of the date of delivery of the award of the arbitration tribunal – at the court of law to have the award set aside if:

- the party having concluded the arbitration contract was lacking legal capacity or competence;
- the arbitration agreement is not considered valid under the law to which the parties have subjected it, or in the absence of such indication, under Hungarian law;
- the party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was unable to present his case due to other reasons;
- the award was made in a legal dispute to which the clause for submission to arbitration did not apply or that was not covered by the provisions of the arbitration agreement; if the award contains decisions on matters beyond the scope of the arbitration agreement where the decisions on matters submitted to arbitration can be separated from those to which the clause for submission to arbitration did not apply, only that part of the award which contains decisions not submitted to arbitration may be set aside;

[282] Case C-168/05, Elisa María Mostaza Claro v. Centro Móvil Milenium SL.
[283] Article 39, Arbitration Act.

- the composition of the arbitration tribunal or the arbitration procedure did not comply with the agreement of the parties, unless such agreement was in conflict with any provision of the Arbitration Act from which the parties cannot derogate, or failing such agreement, was not in accordance with the Act.

An action for setting aside the arbitration award may also be filed alleging that

- the subject-matter of the dispute is not capable of settlement by arbitration under Hungarian law; or
- the award is in conflict with the rules of Hungarian public policy.[284]

The review procedure gives opportunity to the aggrieved party to raise the issues outlined above (arbitrability of public actions, unfairness of arbitration clauses etc.)

The self-regulated class arbitration has to face the challenges under that rule which makes it possible to set aside the arbitral award on the ground that one of the parties was not given proper notice of the arbitration proceedings, or was unable to present his case due to other reasons.

2.5. Effects of the class award

The award of an arbitration tribunal have the same effect as that of a binding court decision, and its implementation is governed by the regulations on judicial enforcement (execution).

The court refuses to execute the award of the arbitration tribunal, if the subject-matter of the dispute is not subject to arbitration under Hungarian law or the award is contrary to Hungarian public policy.[285]

The peculiarities of the execution of judgments passed in lawsuits commenced by public actions were shown in the preceding sections.

2.6. Individual action next to class action

As we have shown above, public actions are without prejudice to individual actions.

If the parties try to exclude by contract the individual actions after public actions, this clause has to face the unfairness test, and probably cannot meet this challenge because the individuals are not able to influence the public actions at all.

284 Article 54-55, Arbitration Act.
285 Article 58-59, Arbitration Act.

In case of self-regulated class arbitration the exclusion of opting out would be beneficial to the defendant, since this solution would make it possible for him to settle in view of the claims of the whole class. The fairness of this model would depend on the details of the procedural provisions.

Finally, the exclusion of public actions by referring the dispute to individual arbitration is also subjected to the unfairness test, and probably fails.

2.7. Conclusion

Class actions are not regulated by Hungarian law. Instead, the legislator prefers public actions. The main feature of this type of collective redress is that the individuals on behalf of whom these actions may be commenced are totally separated from the proceedings. They cannot influence the procedure and they are freed of the burden (e. costs, risk) of it. Public actions are without prejudice to individual actions.

Class arbitrability of public actions is not in principle excluded. However, it is submitted to the unfairness test.

Self-regulated class actions are conceivable but the procedural right of individuals to be heard constitutes a serious obstacle to the simplification of the procedure.

Class Actions and Arbitration Procedures – Italy

Gabriele Crespi Reghizzi & Matteo Dragoni

1. Class actions in general

The so called "class action" is a dispute resolution method, originated from the common law tradition, largely (but not universally) used to resolve disputes in which the same (or similar) legal relationship is common to a plurality of persons. In particular, various class mechanisms have been created to grant "justice" especially in those cases in which there are numerous claims related to the same subject matter but the value of each one of them is so small that individual actions would cost more than the possible return/compensation. Highlighting the rationale of the class action system(s) is important because it explains why it works only in one way: when several persons share the same (or similar) claims, they may start a class action. Vice versa, it is not possible to initiate a class procedure when a person (or a company) has the same or similar claim towards a plurality of possible defendants. While some sort of injustice may be found also in this distinct treatment, the difference aims at avoiding abusive utilization of the class mechanism by large corporations. [286]

Moreover, the creation of class procedures does not respond only to an ideological need for justice, but also to a need for efficiency and rapidity. Both the courts and the parties are expected to benefit from dispute resolution which involves the least possible number of lawsuits. The solution is less costly for the parties and it does not waste time and resources of multiple courts, with the inherent risk of conflicting decisions regarding the same matter.

1.1. Traditional forms of collective procedures in Italy

Before analyzing and commenting what the Italian lawmaker means by "class action", another and older tool used to aggregate individual claims is worth mentioning. We are talking about a more "traditional" joinder or consolidation mechanism provided by the Italian Code of Civil Procedure (c.p.c.) in its Articles 102 and 103.

Article 102 introduces a compulsory rejoinder system for those cases in which a decision cannot be rendered because its effects would also directly apply to subjects

[286] In Italy, in order to avoid any kind of similar abusive utilization, the right to start a class action is granted only to users/consumers and their representatives associations. See *infra* for a detailed explanation.

which have remained outside of the judicial proceedings (and consequently, who did not have the possibility to properly defend themselves). In these circumstances, the judge may order the parties to summon the absent – but necessary – subjects in order to obtain their participation. Whereas the parties fail to implement such consolidation order, the case must be dismissed. It should be noted that once the notification of the order took place, the actual participation of the added parties to the proceedings is totally irrelevant.

Furthermore, Article 103 c.p.c. (the so called voluntary joinder) allows a plurality of parties to sue or be sued in a unified proceeding when the claim and cause of action are the same or when the decision depends, totally or partially, on the resolution of identical issues.

This additional type of voluntary consolidation has the sole purpose of avoiding parallel and possibly dissimilar or conflicting judgments on identical issues but its mechanism, so to say, is the opposite of the judge-consolidated procedure, because, in this case, should the judge find that the positions of the claimants (defendants) differ, he would be entitled to split the proceeding.

However, also in Italy the universally known techniques of joinder/consolidation pursue some of the goals, but are far from the fundamental aim and philosophy, of class actions.

1.2. The recent introduction of a "class action" mechanism in Italy: relevant rules

Class-like actions and dispute resolution methods have a very short history in Italy. Their first and almost unexpected insertion within the national legislative framework occurred in the annual financial law of 2007 (Law n. 244 of 24 December 2007), which, *inter alia*, introduced an Art. 140-bis in the so called "Consumer Code"[287] (Legislative Decree n. 206 of 6 September 2005[288]).[289] However, the heading of this Article (as well as its substance) made no direct reference to the concept of "class", and the new procedure ("collective compensation action"[290]) granted in defense of selected groups of users and consumers – but which could be initiated only by representative bodies (consumers' associations etc.) – had nothing or very little in common with a class action. Only Art. 49 of the subsequent Law n. 99 of 23 July

287 In Italian, Codice del Consumo.

288 The Government of Italy received Parliamentary delegation to tailor such legislation thanks to art. 7, Law n. 229 of 29 July 2003.

289 Said circumstance is worth mentioning and, for an Italian jurist (but, we could say, for every Italian person), it does not need any particular explanation. The annual financial law is usually composed by one to three Articles comprising about one thousand Paragraphs. This is done to speed up its approval by the Italian Parliament: as a result, the annual financial law is a very long and chaotic text in which, sometimes, there are hidden good or (more frequently) bad surprises.

290 Azione collettiva risarcitoria.

2009[291] significantly modified the original Article by changing its heading from "collective" to "class" action[292] and reshaping along a clear class mechanism instead of a collective one.[293]

However, the conditions set out by Art. 140-bis (illustrated *infra*), even after its deep modifications, were so strict that, until recently, only very few class actions survived the preliminary hearing, and none of them was judged admissible by the competent court.[294]

Conscious of the limits of the enacted procedure and the likely benefits of an increased recourse to the same, the new Italian Government once again amended some Paragraphs of Art. 140-bis by Law Decree n. 1/2012[295] with the purpose of extending and easing the admissibility criteria of the class claims. The conversion

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291 Enacted before the entrance into force of the first version of Art. 140-bis, which was supposed to become applicable from 1 January 2010.

292 In Italian, azione di classe.

293 The collective form of action is radically different from the class procedure. In the described initial stage, however, the law only permitted a collective redress system: selected consumers' and users' associations (listed in an ad hoc Ministerial register or even unlisted if adequately representative of the collective interests at stake) could act on behalf of the consumers/users represented in case their rights had been violated, by a professional or a commercial entity, through an adhesion contract (or contracts concluded on a imposed form), or as a consequence of extra-contractual offences, unfair commercial practices or anticompetitive practices. Users or consumers could be part of the class action and become claimant themselves throughout an "opt-in" mechanism, informing the association who started the collective action about their interest in being part of the procedure. The representative associations had only the power to request that the competent Court established their right to a compensation. The Court could not fix the quantum or award directly a damage compensation. Within sixty days from the notification of the decision, the respondent had to propose a concrete amount of compensation to every user/consumer, who in turn could accept or refuse it within sixty days, and the accepted amount was enforceable. Failing a defendant's proposal or a consumer's acceptance the President of the Court would appoint a conciliation tribunal entitled to quantify the damage compensation. The above procedure was quitted as a result of the major criticism as slow, unsafe and uncertain.
See V. Patti, Class action e azione risarcitoria collettiva: analogie e differenze, in Bellelli, Dall'azione inibitoria all'azione risarcitoria collettiva, Padua, 2009, 11 ff. See also M. Serio, Le azioni di classe nel sistema anglo-americano: osservazioni generali, in G. Ajani, A. Gambaro, M. Graziadei, R. Sacco, V. Vigoriti, M. Waelbroeck, Studi in onore di Aldo Frignani, Neaples, 2011; A. Frignani, P. Virano, Le class actions nel diritto statunitense, tentativi (non sempre riusciti) di trapianti in altri ordinamenti, in Diritto ed economia dell'associazione, 2009, 8.

294 The first class action which passed the first hearing is the famous *Ego Flu test* case, decided on 20 December 2010 by the Tribunal of Milan which, eventually, considered the claim inadmissible under the Italian law.

295 A Law Decree is radically different from a Legislative Decree. The latter represents a law created by the Government on indication of the Parliament and (if the indication is respected), it has to be considered as a Parliamentary law. A Law Decree is a temporary law enacted by the Government in urgent situations without prior consent (expressed by a dedicated law) of the Parliament. If the Law Decree is not confirmed within 60 days from its coming into effect, its provisions cease to produce effects within the Italian system. So, a Law Decree is a temporary legislative intervention which needs to be confirmed in order to become a "real and permanent" law. In particular, L. Decree n. 1/2012 is called "liberalization decree" (*decreto liberalizzazioni*), because of its "liberalizing" provisions.

of such "urgency" Decree into Law (n. 27 of 24 March 2012) confirmed, after a short Parliamentary debate, the changes.

2. Italian Class Actions and their peculiarities

The Italian Class Action has been frequently defined as a truncated form of action[296], born incomplete and remained insufficient even after the 2012 changes. This assertion is based on many reasons, starting from the insertion of the class action in a law devoted to various matters rather than a more logical direct modification to the Italian Code of Civil Procedure.

The following section aims at highlighting the peculiarities, or style, of the Italian class action as compared to a traditional U.S. common law model (as adjusted at the end of the 20th century)[297].

2.1. Limited extension: predefined and predetermined restricted groups or classes entitled to the remedy (plaintiffs) and, above all, against whom the class proceedings can be addressed (defendants)

With a significant difference from the approach of the United States – where the Federal Rules of Civil Procedure state that *one or more members of a class may sue or be sued as representative parties on behalf of all members* [...] when *there are questions of law or fact common to the class* (notwithstanding the well-known limits and

296 On Italian class action see, ex multis, G. Alpa, *L'art. 140-bis del codice del consumo nella prospettiva del diritto privato*, in *Riv. trim. dir. e proc. civ.*, 2010, 379 ff.; R. Caponi, *Il nuovo volto della class action*, in *Foro it.*, 2009, V, 383. R.A. Cerrato, *Un "debutto stonato" per la nuova "class action" italiana*, in *Banca, borsa, tit. credito*, 2010, 619 ff.; G. Costantino, *La tutela collettiva risarcitoria 2009: la tela di Penelope*, in *Foro it.*, V, 2009 388 ff.; C. Consolo, *È legge una disposizione sull'azione collettiva risarcitoria: si è scelta la via svedese dello "opt-in" anziché quella danese dello "opt-out" e il filtro ("L'inutil precauzione")*, in *Corr. giur.* 2008, 5 ss., 6; C. Consolo, M. Bona, P. Buzzelli, *Obiettivo class action: l'azione collettiva risarcitoria*, Milan, 2008, 186 ff.; C. Consolo, G. Costantino, *Prime pronunce e qualche punto fermo sull'azione risarcitoria di classe*, in *Corr. giur.*, 2010, 985 ff.; A.D. De Santis, *L'azione di classe a tutela dei consumatori*, in G. Chiné, G. Miccolis (ed. by), *La nuova class action e la tutela collettiva dei consumatori*, Roma, 2010; A. Giussani, *Azioni collettive risarcitorie nel processo civile*, Rome, 2008; M. Gorgoni, *Ancora prove tecniche di applicazione dell'azione di classe: un inventario di questioni irrisolte*, in *Giur. merito*, 2011, 7-8, 1972 (annotation to Milan Tribunal, 20 December 2010, VIII section); A. Pace, *Interrogativi sulla legittimità costituzionale della nuova "class action"*, in *Riv. dir. proc.*, 2011, 1; G. Ponzanelli, *Alcuni profili del risarcimento del danno nel contenzioso di massa*, in *Riv. dir. civ.*, 2006, 327; V. Sangiovanni, *Nozione di consumatore e legittimazione alla class action*, in *Corr. merito*, 2010, 1045 ff. (annotation to Turin Tribunal 27 May 2010); M. Taruffo, *La tutela collettiva: interessi in gioco ed esperienze a confronto*, in Belli (ed. by), *Le azioni collettive in Italia. Profili teorici ed aspetti applicativi*, Milano 2007, 13 ff.

297 The deterrent effect of the United States class action is (sometimes) strongly enhanced by the presence of punitive damages. Thanks to them, even a claim of initial (or intrinsic) small value may lead to an excessive compensation for the claimant(s), with considerable damage for the respondent found responsible. See, *inter aliis*, F. Benatti, *Danni punitivi e "class action" nel diritto nordamericano*, in *Analisi Giuridica dell'Economia*, 2008, pp. 233 and ff. and G. Ponzanelli, *I danni punitivi sempre più controllati: la decisione Philip Morris della Corte Suprema americana*, in *Foro it.*, IV, pp. 179 and ff.

conditions raised by the Rules) – the Italian class action, pursuant to Art. 140-bis Consumer Code and reflecting a bureaucratic and casuistic approach, limits the matter of contention and the groups (or classes) to which the class action (collective redress) procedure is available.

Pursuant to Art. 140-bis, the Italian class action may only be used to protect the following situations[298]:

- the **contractual rights** of a plurality of **consumers and users** whose position, vis-à-vis the same business **enterprise** (*impresa*), is wholly **homogeneous**,[299] including the rights deriving to consumers and users from two distinctive Articles (1341 and 1342) of the Civil Code (which assure a special, more intensive protection when in the presence of general contract conditions and contracts concluded by adhesion to forms or blanks);
- the wholly **homogeneous rights** pertaining to **final consumers** of a given **product** vis-à-vis its **producer**, even absent a direct contractual link between the final consumer and the producer;
- the wholly homogeneous rights, pertaining to users or consumers, to compensation of damages caused by unfair commercial practices or anticompetitive behaviors.

First of all, it is evident that the lawmaker intended to introduce the class action mechanism to protect specific rights of specific categories, originated from specific circumstances, which seem to vary from letter to letter of Art. 140-bis, Paragraph 2. The approach of the Italian legislator is far from being unique or casual, as it takes into account the European Union's intent to foster "group litigation" in the limited areas of consumer law[300] and antitrust law.[301]

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298 Art. 140-bis, Paragraph 2 states in its original language:
"a) i diritti contrattuali di una pluralità di consumatori e utenti che versano nei confronti di una stessa impresa in situazione identica, inclusi i diritti relativi a contratti stipulati ai sensi degli articoli 1341 e 1342 del codice civile;
b) i diritti identici spettanti ai consumatori finali di un determinato prodotto nei confronti del relativo produttore, anche a prescindere da un diretto rapporto contrattuale;
c) i diritti identici al ristoro del pregiudizio derivante agli stessi consumatori e utenti da pratiche commerciali scorrette o da comportamenti anticoncorrenziali."

299 The wording has been changed by the mentioned Law Decree n. 1/2012. The previous version referred to an "identical" position, making the application of the class action procedure practically impossible. The same has happened with regard to subsequent letters b) and c) of Art. 140-bis, Paragraph 2.

300 See, *ex multis*, about group litigation as an effective instrument to protect consumers' rights and all its possible applications and implications: J. Stujck, E. Terryn, V. Colaert, T. Van Dyck, N. Peretz, N. Hoekx, P. Tereszkiewicz, *An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings - Final Report* (A Study for the European Commission), Leuven, 2007; EU Consumer Policy strategy 2007-2013 - *Empowering consumers, enhancing their welfare, effectively protecting them*;

301 See, *ex multis*, regarding antitrust law and group litigation: A. Komninos (ed. by), *Quantifying antitrust damages – Towards non-binding guidance for courts*, 2009 (report prepared by external consultants for the Directorate-General for Competition of the European Commission); *Opinion of the*

Noteworthy, while categories of possible active legitimates oscillate towards uniformity (consumers in a wide sense), the hypothetic passive legitimates vary considerably: business or commercial organizations (letter a), manufacturers (letter b), and providers of products and services (letter c).

Even the matter of contention is subject to variation: letter a) refers, in general, to rights deriving from contracts concluded between users/consumers and a commercial organization; letter b) refers to rights – contractual or extra-contractual – of final consumers of a product vis-à-vis its manufacturer (and connected to the consumption or utilization of such product); letter c) refers to rights to compensation of consumers/users originated by an unfair commercial practice or an anticompetitive conduct of undefined (although foreseeable) entities.

Given this uncertain, untested and apparently closed structure, a tentative clarification of the terminology is of essence.

2.1.1. Users, consumers (and final consumers)

Even if these words seem to refer to different categories of persons, Art. 3.1 of the Consumer Code states that[302] "a consumer or user is any natural person who is acting for purposes which are outside his trade, business, craft or profession"[303]. Consequently, the words "user" and "consumer" end up being used as synonymous[304].

European Economic and Social Committee on the White paper on damages actions for breach of the EC antitrust rules COM(2008) 165 final (2009/C 228/06); *European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules* (2008/2154(INI)); *White Paper on Damages Actions for Breach of the EC antitrust rules* COM(2008) 165, 2.4.2008; *Commission Staff working paper* SEC(2008) 404, 2.4.2008; *Impact Assessment Report* SEC(2008) 405, 2.4.2008; *Executive Summary of this Impact Assessment Report* SEC(2008) 406, 2.4.2008; Press release: *Antitrust: Commission presents policy paper on compensating consumer and business victims of competition breaches* IP/08/515; A. Renda, J. Peysner, A.J. Riley, B.J. Rodger, R.J. Van Den Bergh, S. Keske, R. Pardolesi, E.L. Camilli, P. Caprile, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* (report to the EU commission DG COMP/2006/A3/012), 2007; *Opinion of the European Economic and Social Committee on the Green Paper — Damages actions for breach of the EC antitrust rules* COM(2005) 672 final; *Green Paper - Damages actions for breach of the EC antitrust rules* COM(2005) 672, 19.12.2005; *Commission Staff working paper* SEC(2005)1732;

302 The original Italian version states: "consumatore o utente: la persona fisica che agisce per scopi estranei all'attività imprenditoriale, commerciale, artigianale o professionale eventualmente svolta".

303 The same definition of (the sole) consumer is contained in Art. 2 of the recent "Directive 2011/83/EU of the European Parliament and the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council EU Directive 83/2011".

304 The meaning of consumer/user is not so well defined as it could seem, being it constantly adjusted and re-defined throughout the entire Consumer Code. See, ex multis, G. Conte, *Dalla tutela collettiva in senso proprio alla tutela cumulativa*, in V. Vigoriti, G. Conte, *Futuro, giustizia, azione collettiva, mediazione*, Turin, 2011, pp. 31 ff.

2.1.2. Producer, individual entrepreneurs and business organizations (impresa), other possible defendants responsible for anti-competitive or unfair commercial practices

Art. 3.1 of the Consumer Code[305] defines the producer as "the manufacturer of the goods or the provider of the service, the importer of the goods or the importer of the service into the territory of the European Union or any other legal or natural person purporting to be a manufacturer by placing his name, trade mark or other distinctive sign on the goods or the service".

Unlike the term "producer", the Consumer Code does not define the meaning of "*impresa*". The Italian Civil Code, however, contains the definition of "entrepreneur"[306] (*imprenditore*) as "a person who is engaged professionally in an economic activity organized for the purpose of production or exchange of goods or services".

With regard to the antitrust class actions, the possible respondents remain undefined in Art. 140-bis Consumer Code, but most interpreters refer to European antitrust law (on which Italian antitrust law is based)[307] and to Art. 18 Consumer Code where any "professional" can be responsible of commercial practices and anticompetitive conducts[308]. In turn, "professional" is defined by the Consumer Code as "any natural or legal person who is acting in the course of his trade, business, craft or profession or one of his intermediaries[309]".

2.2. Absence of a numeric prerequisite and of other "American" conditions within the Italian class action

Nowhere in the Italian class action legislation is to be found the condition that the class be "*so numerous that joinder of all members is impracticable*[310]. As a consequence, in Italy a class action may be started independently of the number of the class

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305 The original Italian version states that: produttore: fatto salvo quanto stabilito nell'art. 103, comma 1, lettera d), e nell'articolo 115, comma 2-bis (4) il fabbricante del bene o il fornitore del servizio, o un suo intermediario, nonchè l'importatore del bene o del servizio nel territorio dell'Unione europea o qualsiasi altra persona fisica o giuridica che si presenta come produttore identificando il bene o il servizio con il proprio nome, marchio o altro segno distintivo.

306 Precisely Art. 2082 Civil Code: "E' imprenditore chi esercita professionalmente un'attività economica organizzata al fine della produzione o dello scambio di beni o di servizi".

307 *See* G. Conte, ID, pp. 49 ff.

308 There "unfair commercial practice between professionals and consumers" is indicated as "every action, omission, conduct or commercial communication, included the advertising and the commercialization of the product, made by a professional, in relation to the promotion, sale or supply of a product to consumers" (*"qualsiasi azione, omissione, condotta o dichiarazione, comunicazione commerciale ivi compresa la pubblicità e la commercializzazione del prodotto, posta in essere da un professionista, in relazione alla promozione, vendita o fornitura di un prodotto ai consumatori")*

309 Once again, Art. 3.1 Consumer Code: professionista è la persona fisica o giuridica che agisce nell'esercizio della propria attività imprenditoriale, commerciale, artigianale o professionale, ovvero un suo intermediario.

310 Federal Rules of Civil Procedure, Rule n. 23, Paragraph A.1.

components, the effect of which seems unreasonable to many interpreters. Thus, in Italy, the plaintiff does not have to prove that the joinder of all members of the class would be so difficult that a class action is justified. Nor does he have to prove that the class action is the most fair, efficient and secure way to solve the controversy: an unavoidable duty of the U.S. Class lawyer.[311]

Italian law provides that the offenders' behavior must consist in the same pluri-offensive action or series of actions[312] or, alternatively, in similar kinds of actions producing or inducing analogous effects for the users/consumers, but besides this provision the lawmaker is silent on further criteria to assess the homogeneity of the rights of the class members[313]. Only the competent Court having certified (declared *prima facie* admissible) the class action is required to set out a list of criteria which have to be met by the single members in order to be considered part of the class[314].

The lawmaker specifies further that a class plaintiff must be adequately representative of the entire class of users/consumers he is representing, but without giving any guidelines to assess the exact scope of "adequately" (representative).

Finally, it should be noted that the "opt-in" Italian system (see *infra* for more details) may be hardly compatible with "unicity" of the Italian class action. In fact, once a class action has been started against a certain subject, the latter cannot be a defendant in another class action regarding the same *causa patendi*. Every person who is acting for the recognition of the same rights has – and is allowed – to do

311 *See* Federal Rules of Civil Procedure, Rule n. 23, Paragraph B:
b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
(1) prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, it would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

312 *See* C. Scognamiglio, *Risarcimento del danno restituzioni e rimedi nell'azione di classe*, in *Resp. civ. e prev.*, 2011, 03, 501.

313 The U.S. legislator provides such suggestions in Rule 23 of Federal Rules of Civil Procedure, Paragraph B.3 (*infra* quoted).

314 So it states Art. 140-bis, p. 9.," a) definisce i caratteri dei diritti individuali oggetto del giudizio, specificando i criteri in base ai quali i soggetti che chiedono di aderire sono inclusi nella classe o devono ritenersi esclusi dall'azione".

so individually. However – especially considering the absence of an admissibility system based on the number of the class components – this may result in a failure of the entire class litigation system.

2.3. The "opt-in" Italian choice

Another aspect of Italian class action, which makes it radically different from the U.S. archetype, is the choice of an "opt-in" instead of an "opt-out"[315] system. Once a class action has been initiated, and until a time limit fixed by the judge, every person who wishes to be part of the class and is able to prove it may opt-in, *i.e.* join the class action.

Although many Italian scholars would agree that the opt-out mechanism could be less costly and more efficient, that mechanism seems to contradict some constitutional provisions which indirectly prohibit "compulsory" legal actions absent any consent or information by a relevant, and undeterminable, part of the class components (with the consequent deprival of their right to individual defense) (Art. 24 Cost.[316]) and limit the effect of a judgment to the parties of the related proceeding (Art. 112.2 Cost.[317]).

2.4. The Italian procedure in detail

The individual homogeneous rights referred to within Paragraph 2 of Art. 140-bis Consumer Code may be protected through a class action. Every component of the class can start the class procedure, personally or through an association devoted to protect user/consumer rights. The other members of the class can join[318] the action without the need of an attorney, provided that they waive their rights to prosecute or initiate individual actions based on the same *causa petendi*. With regard to the statute of limitations, the initial time starts from the serving of the claim and, for the subsequent participants, from the date of the deposit of the act of participation.

At the end of the first hearing, in which the Public Prosecutor may participate, the competent regional Court decides on the admissibility through a procedural order.[319] The inadmissibility shall be declared when the request is clearly groundless; if there is a conflict of interests; when the judge considers the individual rights of the plaintiffs non-homogeneous, and when the plaintiff is found incapable of

315 Ex multis, see T. Eisenberg, G.P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, in 57 *Vanderbilt Law Review* 1529, 2004.

316 Art. 24 Cost: "Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi. La difesa è diritto inviolabile in ogni stato e grado del procedimento.[ ]"

317 Corroborated and clarified by Art. 2909 of the civil code.

318 The act of joining has to contain the election of domicile and the evidence supporting the claim and it has to be deposited at the Tribunal's chancery.

319 The judgment may be suspended in case another judgment is pending before an independent authority or before an administrative court.

adequately representing the interests of the class. If the claim is found inadmissible, the procedural order shall be largely publicized and the costs thereof shall be borne by the losing party.

The Court order which decides on admissibility may be opposed before the Court of Appeal within thirty days from its serving or (if antecedent) its communication. The Court of Appeal decides by a procedural order within forty days from the deposit of the act of appeal. During the appellate proceedings the main proceedings – in case of admission – are not suspended.

Further, the procedural order which declares the claim admissible determines also the means by which, and the time limits, the judge deems to be appropriate for publicizing the possibility to join the class action. In the same order, the Court defines: the individual rights to be dealt with in the class proceedings, specifying the criteria a natural person must possess in order to join the class action; the time-limits for the acceptance of new class action participants[320]; the cost and the rules (evidentiary, etc.) of the proceedings[321].

If the Court finds for the Claimant(s), it liquidates the sums due to each original plaintiff and subsequent class action participant or determines the homogeneous criterion to calculate such amounts. The judgment – valid vis-à-vis every class participant – becomes fully enforceable after 180 days from its publication and any payment made within this period is exempted from any duty, tax or interest matured during the period.

2.5. Administrative or Public Administration class action

Another type of class-like action has been introduced by Legislative Decree n. 198 of 20 December 2009[322]. The differences with the class action just described concern the nature of the defendant, exclusively central or local State administration, and the remedy obtainable (never monetary compensation).

Indeed, the scope of application of this redress system is limited to the relationships between users/consumers and the Public Administration, acting as an administra-

320 Once said date passes, no other class action may be filed, or any individual action may be started by the admitted class participants, with regard to the same *causa petendi*.

321 So states Art. 140-bis, P. 11: "il tribunale prescrive le misure atte a evitare indebite ripetizioni o complicazioni nella presentazione di prove o argomenti; onera le parti della pubblicità ritenuta necessaria a tutela degli aderenti; regola nel modo che ritiene più opportuno l'istruzione probatoria e disciplina ogni altra questione di rito, omessa ogni formalità non essenziale al contraddittorio".

322 Decree issued under Parliamentary delegation contained in Law n. 15 of 4 March 2009 [in materia di ricorso per l'efficienza delle amministrazioni e dei concessionari di servizi pubblici]. See, in general, F. Cintoli, *Note sulla cosiddetta class action amministrativa*, in V. Vigoriti, G. Conte, *Futuro, giustizia, azione collettiva, mediazione*, Turin, 2011, pp. 275 ff.

tive and non-commercial entity. The aim of such redress action is to stop and cure the incorrect implementation of a function or the incorrect supply of a service on the part of a Public Administration (PA) agency. As a consequence, through this procedure, no compensation may be obtained by the subjects possibly damaged by the P.A.'s malfunctioning[323].

Incidentally, the lawmaker carefully avoids the word "class", notwithstanding the evident resemblance with Art. 140-bis Consumer Code's procedure, and replaces it with the word "plurality": precisely a plurality of users/consumers who have been prejudiced by an action (or omission) of the Public Administration.

3. Class Actions and Arbitration

3.1. Arbitration in Italy. Relevant rules

In Italy[324], the rules on arbitration may be found in the text of the Code of Civil Procedure (c.p.c.), at Section VIII, Articles 806 – 840, as well as in a number of multilateral and bilateral conventions ratified by the Government of Italy, such as the 1958 New York Convention on Recognition and Enforcement of Foreign Awards, the 1961 European Convention on International Arbitration, and the 1965 Washington (ICSID) Convention.

Italian law accepts the classical distinctions between ad hoc and administered arbitration and, as far as arbitration agreements are concerned, between an agreement to submit to future arbitration (arbitrable) disputes (*clausola compromissoria*) and an agreement to submit to arbitration disputes which have already arisen between the parties (*compromesso in arbitri*). Arbitrable disputes can arise from both contractual and non-contractual matters. Besides traditional arbitration (*arbitrato rituale*), Italian law also admits a peculiar kind of arbitration (*arbitrato irrituale*), in which awards have not the nature of a judgment but rather of a contractual settlement.

A 2006 reform has repealed the distinction effective since 1994 between domestic and international arbitration. Remnants of that distinction can only be found in the provision of Article 830, according to which, whenever the dispute arises from a subjectively international contract, the Court of Appeal requested to annul an arbitral award may directly decide the merits of the case only if so required by all

323 As expressely stated by Art. 1, P. 7 of the mentioned Legislative Decree: "Il ricorso non consente di ottenere il risarcimento del danno cagionato dagli atti e dai comportamenti di cui al comma 1; a tal fine, restano fermi i rimedi ordinari".

324 *See* in general, for arbitration in Italy, G. Crespi Reghizzi, *Italy*, in *The International Comparative Legal Guide to: International Arbitration 2012*, London, 2012, pp. 287-295 and G. Crespi Reghizzi, *Italy*, in *Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards, ICC Bulletin – Special Supplement*, 2008, pp. 165-168.

the parties. As a consequence, mandatory rules governing arbitration in general apply to both domestic and international arbitration proceedings sited in Italy.

The most significant of these mandatory requirements is the duty – provided for by Article 816-bis c.p.c. – to grant all parties reasonable and equal opportunities to present their case (principle of *contradictoire*). More specific mandatory rules can be found under Article 815 c.p.c., which assigns to State courts the final judgment on challenges and under Article 818 c.p.c., preventing the arbitrators from issuing interim measures.

International arbitration must, of course, be distinguished from "foreign" arbitration, more precisely, from arbitral awards rendered abroad. Articles 839 and 840 c.p.c. regulate recognition and enforcement of such awards, along the lines of the 1958 New York Convention.

Moreover, while original arbitration law was extensively autochthonous, since 1993 the Italian legislator has been growingly inspired by the UNCITRAL Model Law. However, UNCITRAL bifurcated approach to domestic and international arbitration was abandoned in 2006.

3.2. The Arbitration Agreement

The c.p.c. contemplates only two mandatory requirements for an arbitration agreement (Article 807): it must be in writing *ad substantiam* and clearly determine the subject matter of the dispute. The arbitration clause in writing can also be appended to, rather than inserted, in the contract involved, and has always the legal effect of excluding the jurisdiction of the courts.

Moreover, Article 809 c.p.c. establishes that the arbitration agreement must contain the appointment of the arbitrators or establish their number and the manner in which they are to be appointed.

The arbitral tribunal must consist of an odd number of arbitrators; when the arbitration agreement indicates an even number, the additional arbitrator will be appointed, unless the parties have agreed otherwise, by the President of the Court where the arbitration has its seat, or, if no seat has been established, of the place where the agreement has been concluded, or if such place is abroad, by the President of the First Instance Court of Rome.

Obviously, it is advisable to define the place and the language of arbitration and the law applicable to the dispute.

By virtue of the principle of autonomy of the arbitration agreement (article 808, para. II c.p.c.), and of *Kompetenz-Kompetenz* (article 819-ter, para. III c.p.c.), no State

court can normally interfere while the arbitral proceeding is pending and until a final award (at least on jurisdiction) is issued.

3.3. Jurisdiction

Based on the abovementioned principle of *Kompetenz-Kompetenz*, arbitrators are permitted to rule on the validity, extension and effectiveness of the arbitration agreement in order to verify their *potestas iudicandi*.

After an arbitration has been established, national Courts must refrain from addressing the issue of the *potestas iudicandi* of the arbitrators, who have the exclusive competence to verify their own powers (Article 813 ter c.p.c.). Even in case of *lis alibi pendens* before a national judge, the arbitrators have still the power to state their own jurisdiction. Only after their decision is taken, through an interim or final award, such award can be attacked before a national Court.

However, when litigation precedes arbitration, the court will address the issue of competence of the national arbitral tribunal (Article 819-ter, para. I c.p.c.)

Also appellate courts may address the issue of jurisdiction and competence of an arbitral tribunal when they are requested to set aside an award.

3.4. Arbitrability

The key provision of the c.p.c. (set forth in Article 806) bans arbitration of disputes concerning rights that the parties are not allowed to freely dispose of and limits to some extent arbitration of labour disputes. The wording of the article shows a certain degree of *favor* towards arbitration: what is not explicitly considered non-arbitrable by the law may be submitted to arbitration. While it is rare in commercial matters, non-arbitrability is common in non-commercial matters (family law, consumer law, labour law, etc.).

First of all, it must be clarified that the exclusive (subject matter or geographic) competence of Italian courts has nothing to do with arbitrability, the latter being a completely different issue.

Also certain statist limits of the past, such as the necessary participation of a Public Prosecutor to a civil dispute or the century old differentiation between right and legitimate interests, are no longer viewed by contemporary interpretations as an automatic barrier to arbitrability.

It is worth mentioning a recent Italian (sport) arbitration case in which the distinction between legitimate interests and subjective rights was found not to overlap with the distinction between non-disposable and disposable rights. According to the

Arbitral Tribunal, even cases involving legitimate interests, but not non-disposable rights, may be validly submitted to arbitration.[325]

3.5. Privity of arbitration and multiparty arbitration

The general rule under Italian law is that the arbitration agreement binds only the parties who have signed the agreement. There are a few exceptions to this rule, established by statute or case law.

The first exception is established by Article 35, para 2 of Legislative Decree no. 5 of 2003 on the reform of corporate law. This article allows, with exclusive reference to corporate arbitration, voluntary intervention in the arbitration proceedings of interested third parties who are not members of the corporation; by so doing, they become parties to the arbitration and are thus bound by any relevant award. As an example, one may quote the case of an insurance company intervening in an arbitration proceeding where a manager of a corporation, insured with the same company, is sued by a party claiming damages for *mala gestio*.

The same decree (Article 34, para 4) states that an arbitral clause contained in the corporation's by-laws may provide that arbitration will apply to all claims initiated by managers, liquidators and other organs of the corporation or laid to them. The departure from the general rule is the circumstance that managers, liquidators etc. who are not members of the corporation are bound by the arbitration agreement even though they have not signed it.

Moreover, in both the above described situations, arbitrators are empowered to attract *ex officio* to the arbitration proceeding, any third party being a member of the corporation.

In cases unrelated to company law, third party voluntary intervention and its attraction to the arbitral proceedings always require the agreement of the third party concerned, all the arbitrators and all the parties to the arbitration, unless we deal with situations of necessary joinder of party.

In Italy, multiparty arbitration is typically linked to intra-corporate arbitral proceedings. The joint appointment of arbitrators is a well-known difficulty in multiparty arbitration proceedings. In order to tackle the problem, the legislator introduced a special selection mechanism in 2003, as above described.

The same, or a very similar solution, was extended in 2006 to all multiparty arbitration disputes, irrespective of their corporate or non-corporate nature, by Article 816

[325] *See* G. Ludovici, Le posizioni giuridiche di interesse legittimo possono considerarsi disponibili ai sensi dell'art. 1966 c.c. e quindi astrattamente compromettibili, in Rivista dell'arbitrato, 2012, n. 1.

quater c.p.c., which reads: "Should more than two parties be bound by the same arbitration agreement, each party may request that all or some of them be summoned in the same arbitral proceedings, provided that the arbitration agreement defers to a third party the appointment of the arbitrators, or the arbitrators are appointed by agreement of all parties or the other parties, following the appointment by the first party of an arbitrator or more arbitrators, jointly appoint by common agreement an equal number of arbitrators or entrust to a third party their appointment."

The same article provides that if the conditions set out above are not met, separate arbitration proceedings must take place. However, if such conditions are not met and the law provides for the case a necessary joinder of parties, arbitration cannot take place. The consolidation of a plurality of arbitral proceedings may occur only when all the parties to the arbitral proceeding so agree. In this event, the parties will have to find an agreement as to the appointment of the new arbitral tribunal.

3.6. Choice of (substantive) Law

EU Regulation no. 593/2008 (so-called Reg. "Rome I", on the law applicable to contractual obligations) allows the parties to a contract to choose the law applicable to their contractual relationship, whereas a more limited freedom of choice is granted by EU Regulation 864/2007 (so-called Reg. "Rome II", on the law applicable to non-contractual obligations) in case of disputes arising out of a non-contractual relationship.

Arbitrators must respect the choice of law made by the parties. Failing such choice, the arbitrators can freely determine the law applicable to the substance of the dispute.

Arbitrators can decide *ex aequo et bono* only when authorised to do so by the parties.

For disputes falling within the scope of the 1961 Geneva European Convention on International Commercial Arbitration, the determination of the applicable law must be done through the rules of conflict chosen by the arbitrators (so called "indirect rule").

Mandatory laws (of the seat or of another jurisdiction) shall prevail over the law chosen by the parties according to Articles 3.3, 9.1, and 9.3 of EU Reg. 593/2008, respectively devoted to simple mandatory norms, overriding mandatory provisions of the seat and overriding mandatory provisions of other jurisdictions. The same principles apply to arbitration.

Under the principle of autonomy, the existence, validity and effectiveness of the arbitration agreement must be evaluated independently from the contract in which the agreement is included.

Consequently, the law governing the arbitration agreement may differ from the law applicable to the contract.

The 1961 Geneva Convention offers three subsequent parameters to evaluate the validity of arbitration agreements: the law chosen by the parties, if any, the law of the country in which the award is to be made, and the law applicable under the rules of conflict of the country where the court seized of the dispute is located.

3.7. Appointment of Arbitrators

Parties are free to select and appoint arbitrators, excluding people lacking, or limited, in their legal capacity. However, in intra-corporate disputes, and when the arbitration agreement is inserted in the by-laws of the company, the power to appoint arbitrators can only belong to a person not connected with the company (otherwise the clause is null and void).

If the parties' chosen method for selecting arbitrators fails, or when the parties do not appoint their arbitrator, or do not succeed in selecting the sole arbitrator or the chairman of the arbitral tribunal, Art. 810 c.p.c. transfers the corresponding power to the President of the Court.

The judge can intervene in the selection of arbitrators, both in the cases mentioned above and where the arbitration agreement has given the judge the choice of the sole arbitrator or of the collegium. Moreover (see corporate arbitration proceedings governed by an arbitration clause contained in the by-laws), the choice of the arbitrators by a third person not connected with the company has become compulsory. As it is not unusual to select a Court President as a company-independent appointed authority, the numbers of arbitrators chosen by the judiciary is likely to increase.

The requirements of independence and impartiality of the arbitrators are a matter of principle of public policy, and therefore cannot be departed from, irrespective of the nature of the arbitration. Arbitrators lacking independence can be challenged according to the procedure described in Article 815 c.p.c.

No specific rules of Italian law govern arbitrators' disclosure. Nevertheless, the "Code of Ethic and Conduct" of the Italian Bar Association provides in Article 55 the duty of the arbitrator to communicate to the parties every relationship, fact and event that might affect his independence. Naturally, the Code only binds arbitrators who are members of the Bar.

Moreover, Article 815 c.p.c. provides that an arbitrator may be challenged if:

- he or she or an entity, association or company of which he or she is a director has an interest in the case;

- he or she or his or her spouse is a relative up to the fourth degree or a cohabitant or a habitual table-companion of a party, one of its legal representatives or counsel;
- he or she or his or her spouse has a pending suit against or a serious enmity to one of the parties, one of its legal representatives or counsel;
- he or she is linked to one of the parties, to a company controlled by that party, to its controlling entity or to a company subject to common control by a subordinate labour relationship or by a continuous consulting relationship or by a relationship for the performance of remunerated activity or by other relationships of a patrimonial or associative nature which might affect his or her independence; furthermore, if he or she is a guardian or a curator of one of the parties; or
- he or she has given advice, assistance or acted as legal counsel to one of the parties in a prior phase of the same case or has testified as a witness.

Furthermore, most arbitration institutions in Italy have published guidelines for arbitrators' disclosure. See, e.g., the Arbitration Rules of the Chamber of Commerce of Milan, which request the arbitrators to submit a statement of independence to the Secretariat. In said statement, the arbitrator must mention: a). any relationship with the parties or their counsel which may affect his impartiality and independence; b). any personal or economic interest, either direct or indirect, in the subject matter of the dispute; and c). any prejudice or reservation as to the subject matter of the dispute as well as the time and duration of the above.

3.8. Interim Measures

Notwithstanding a growing debate in Italy, and the contrary solution reached in most arbitration-friendly legal systems, the traditional approach reserving to State Courts the power to issue interim measures has not been changed. Therefore, Article 818 c.p.c. prevents arbitrators from granting any such measures, whether *ante causam* or during the proceedings, and irrespective of their nature.

Interim measures must therefore be requested to the national Court who would have jurisdiction on the case, had the parties not chosen arbitration.

The parties' request to a Court for interim relief has no effect on the jurisdiction of the arbitral tribunal.

However, since 2003, arbitrators may order the stay of challenged resolutions of shareholders' meetings in intra-corporate disputes.

3.9. Appeal of an Award

While appeals *strictu senso* (revision of the merits) are obviously not permitted, a party request to set aside (annul) an award can be filed with the Court of Appeal

of the district where arbitration took place, within 90 days from the date when the award was received, only for one of the reasons set out in Article 829 c.p.c., i.e.:

- if the arbitration agreement was invalid;
- if the arbitrators have not been appointed according to the provisions laid down in the c.p.c.;
- if the award has been rendered by a person who could not be appointed as arbitrator;
- if the award exceeds the limits of the arbitration agreement;
- if the award does not comply with the mandatory requirements mentioned above;
- if the award has been rendered after the expiration of the time-limit;
- if during the proceedings, the formalities prescribed by the parties under express sanction of nullity have not been observed, and the nullity has not been cured;
- if the award is contrary to a previous award or judgment having the force of res judicata between the parties, provided that such award or judgment has been submitted in the proceedings;
- if the principle of due process has not been respected in the arbitration proceedings;
- if the award terminates the proceedings without deciding the merits of the dispute and the merits of the dispute had to be decided by the arbitrators;
- if the award contains contradictory provisions; or
- if the award has not decided some of the claims and counterclaims submitted by the parties within the scope of the arbitration agreement.

Pursuant to Article 829, the objection based on the reasons sub. 1, 2, 4 and 8 must have already been raised by a party during the proceedings.

The party whose conduct was a cause of nullity is prevented from requesting avoidance of the award.

The Court of Appeal may annul the award entirely or partially.

A party filing a request for annulment of an award may also ask for the stay of its enforcement.

3.10. Enforcement of an Award

Regarding the enforcement of an award, it is to notice that the New York Convention to which Italy is a party was ratified by Law no. 62 of January 19, 1968. No reservations have been entered by Italy.

The matter is presently regulated by Articles 839 and 840 c.p.c. which also apply to non-conventional foreign awards. Whoever wishes to have a foreign award take effect in Italy must file a petition with the President of the Court of Appeal. The

President, after ascertaining that the award complies with formal requirements, the dispute is arbitrable under Italian law and the award is not contrary to Italian public policy, orders recognition and enforcement. This order becomes final if no objections are raised within 30 days, based on the grounds set out in article 840, coinciding with those provided for by article V of the New York Convention. The final decision of the Court of Appeal may be challenged before the Court of Cassation on limited grounds.

Italian courts easily grant recognition and enforcement of arbitration awards provided that the award complies with formal requirements and is not contrary to public policy. However, public policy plays indeed a very minor role in commercial arbitration.

Under Italian law the arbitral award is binding for the parties to the arbitration as of the date of its signature by the arbitrators, in the same way as it is a judgment of a national court. The new Article 824-bis provides that: "The arbitral award has as of the date of its last signature by the arbitrators the same effects of a judgment rendered by a national court". The issues decided by the award are thus covered by res judicata and may not be reheard by a national court.

3.11. Confidentiality

Despite the absence of specific provisions and case law it is generally held that confidentiality is a classical feature of arbitral proceedings. Confidentiality covers the proceedings as well as the award. However, the parties may agree with the consent of the arbitral tribunal to disclose certain aspects of the arbitration to third persons or to the public. Moreover, there may be specific situations, such as a request of a government agency or of a national court, where information must be disclosed to such public authorities.

A difference in principle can be drawn between information and documents created only for the dispute, which are confidential, and any information and documents which existed prior to, and independently from, the dispute. However, both categories of information and documents can be referred to and/or relied on in special cases (criminal proceedings, setting aside proceedings etc.).

The proceedings are not entirely protected by confidentiality in case the award has to be enforced in Italy or is challenged before an Italian Court.

3.12. Arbitrability of class disputes

A conclusion against arbitrability of class disputes may be inferred – at least partially – from the previous paragraphs on Italian class action in general, as well as from

the prevailing attitude in civil law systems. However, for the sake of completeness, a wider analysis of the question can be of some use.

A fundamental and radical prerequisite is that all contracts concluded between the respondent and each possible claimant (class participant) should contain the same arbitration clause, identical in all its elements: number of arbitrators, same appointing independent authority etc. For the reason explained further in this paragraph, the fulfilment of this prerequisite is extremely difficult in the present Italian legal scenery.

Naturally, the requirements of the Italian "judicial" class action (homogeneity of rights of the class participants, plaintiff's adequate representativeness of class interests etc.) would apply also to a hypothetic class action arbitration.

Moreover, under Italian law, class arbitration would never be permitted on an opt-out basis, because consent, the right to initiate a proceeding, the right to individual and adequate defence and the right to proper notice are fundamental principles of national law from which it is presently impossible to derogate.

Since any class arbitration would have to be based on an opt-in system, the closest model to consider is the mechanism offered by multiparty-arbitration.

The joint-appointment of arbitrators is the key issue. As explained before, the Italian c.p.c., not too originally, deals with the matter mainly in its Art. 818-quarter, which reads: *Should more than two parties be bound by the same arbitration agreement, each party may request that all or some of them be summoned in the same arbitral proceedings, provided that the arbitration agreement defers to a third party the appointment of the arbitrators, or the arbitrators are appointed by agreement of all parties or the other parties, following the appointment by the first party of an arbitrator or more arbitrators, jointly appoint by common agreement an equal number of arbitrators or entrust to a third party their appointment.*

Obviously, unless an arbitration clause specifically states that the entire arbitral tribunal must be appointed by a third-party, it would not be an easy task to make the parties agree on the appointment, and especially to obtain the approval of the possible respondent.

Unfortunately, the preceding observations are only theoretic, owing to the obstacle represented by Article 33, paragraph 2, letter t) Consumer Code. This Article characterizes as vexatious, and as such null and void, all contract provisions compelling

consumers to waive their right to a proceeding before a State court (as distinguished from arbitration tribunals)[326].

The "vexation" exception can be raised only by the consumers, so that in theory – naturally in the presence of identical arbitration clauses – an arbitration proceeding would meet no objection should the class arbitration be started by all the affected consumers. But obviously this is impossible, as even a single consumer opting for a State court would endanger the whole class action arbitration. Moreover, should the consumers, under a contract with the same arbitration clause, sue the professional before a State court, the respondent's "arbitration" exception would be rejected.

Significantly, because of all these reasons, no Italian arbitral center has ever published supplementary rules on class action arbitration or a dedicated set of rules for class arbitration[327].

But a broader and final question remains unanswered: why should consumers prefer class arbitration to class litigation?

3.13. Enforcement of class awards rendered abroad

Due to Italy having ratified the New York Convention, a party may challenge the recognition and enforcement of a foreign award on grounds of procedural unfairness or lack of opportunity to present a party's case Consequently, any objection to the recognition of a foreign class arbitration award (more so if the award dismisses the class participants' claims), being the result of an "opt-out" class action, would be easily upheld in Italy. In this regard, reference should also be made to Art. 24 of the Italian Constitution.

Moreover, under the New York Convention, recognition can be refused also when it is proved that *the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties*. Such provision endows a professional respondent with a formidable exception, unless all identical contract arbitration clauses contemplated the appointment of the arbitrator(s) by the same independent appointing authority: the deprivation of respondent's procedural rights under an

[326] Of course, this is a mere presumption, as highlighted by the subsequent Article 34, Paragraph 1, which reads: the vexatious character of a clause is assessed taking into account the nature of the good or the service being the object of the contract, and considering all the circumstances at the time of its conclusion, the other clauses of the same contract or the clauses of any other connected or depending contract. Besides, the Paragraphs 4 and 5 of the same Article specify that clauses or elements of a clause which have been individually negotiated are not vexatious. In contracts concluded by adhesion to forms or blanks, [...] the professional has to prove that the single clauses or elements thereof have been separately negotiated with the consumer. If a clause is deemed to be vexatious, as per Article 36 Consumer Code, it is null and void.

[327] Because of the obstacles raised by the Italian legislator and the necessary opt-in nature of hypothetical Italian class arbitration, reference to the admissibility criteria for class arbitration set out by U.S. judge-made law would be of little help.

arbitration agreement by the sole presence of multiple similar agreements and a class interested in initiating a class arbitration.

Finally, class arbitration is inherently procedural, and an Italian court could easily deny the enforcement of a class award also on the basis of procedural irregularities, availing itself of the (procedural) public policy exception.

Class Actions and Arbitration Procedures – Portugal

José Miguel Júdice & António Pedro Pinto Monteiro

1. Introduction

It is well known that class actions and arbitration are two realities that do not combine in the European Union. At least, not yet...

Nevertheless, some authors seem to believe that it could only be a matter of time before Europe will be convinced of the advantages of the US class action mechanism as an effective procedural tool. Others, quite the opposite, don't see the advantages....

That being said, what is the situation in Portugal? Does Portuguese law provide for any form of collective redress? Is there a class action mechanism in Portugal?

If so, who may come forward to represent groups of claimants and in what circumstances? And how does the representation work? Does Portugal have an opt-out or an opt-in system?

Finally, and most importantly, is there any chance of a class action arbitration being admitted? Does the new Portuguese Arbitration Law provide any clarification on the matter? And is there any arbitral institution foreseeing class action arbitrations?

These are some of the many questions we will analyze in the present paper. In short, our purpose is to determine if there is (or if there will be) a connection between class action and arbitration in Portugal, to the point where we could have a so called "class action arbitration". For that matter, we will start with an overview of Portuguese law on the subject, after which we will address arbitration and reach our conclusion.

2. Portuguese System of Class/Group Actions – The popular action

Portugal has what might be called a class action mechanism: the so called popular action ("*acção popular*").[328]

[328] Law No. 83/95, of 31 August 1995 (Law of Popular Action) and Article 52, paragraph 3, of the Portuguese Constitution.

In fact, and as some authors correctly observe, the Popular Action Law was in some points influenced by the American class actions[329] – particularly, as we will see, in the special regime of representation contemplated in Articles 14 and 15 (*opt-out principle*).

But before that, we must start by pointing out that popular actions are very old and have a long tradition in Portuguese law.[330] Their origins are rooted in Roman Law (the "*actio popularis*" or the "*pro populo*" action), where they were defined as actions that, although were meant to protect the interest of the community, could be filed by anyone.

The popular action was first contemplated in the Portuguese "*Ordenações Manuelinas*" (beginning of the 16th century) and "*Ordenações Filipinas*" (17th century) and, much later, in the Constitutional Chart of 1826.[331] This is also a mechanism that long existed in Administrative Law, which distinguished between a popular action of a corrective nature and a popular action of a subsidiary nature.

However, it was in the Portuguese Constitution of 1976 (particularly after its 1989 revision) that the popular action was recognized as a fundamental right. As leading Portuguese scholar Gomes Canotilho states, the Constitution proceeded to a

329 *See* António Payan Martins, Class Actions em Portugal? Para uma análise da Lei n.º 83/95, de 31 de Agosto – Lei de Participação Procedimental e de Acção Popular, Edições Cosmos, Lisboa, 1999, page 26, Miguel Teixeira de Sousa, A legitimidade popular na tutela dos interesses difusos, Lex, Lisboa, 2003, page 119, Luís Sousa Fábrica, "A Acção Popular no Projecto de Código de Processo nos Tribunais Administrativos", in Cadernos de Justiça Administrativa, n.º 21, Maio/Junho 2000, page 17, and Ada Pellegrini Grinover, "A ação popular portuguesa: uma análise comparativa", in Lusíada – Revista de Ciência e Cultura, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada – Porto, Porto, 1996, page 246. For an analysis of the Popular Action Law, see also Henrique Sousa Antunes, "Class Actions, Group Litigation & Other Forms of Collective Litigation (Portuguese Report)", paper presented at "The Globalization of Class Actions" conference, December 2007, Centre for Socio-Legal Studies, University of Oxford,England,availableonline at http://www.law.stanford.edu/display/images/dynamic/events_media/Portugal_National_Report.pdf, Tito Arantes Fontes / João Pimentel, "Portugal", in *The International Comparative Legal Guide to Class & Group Actions 2011. A practical Cross-Border Insight into Class and Group Actions Work*, Global Legal Group, London, pages 123-128, and Lisa Tortell, "Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Portugal", 2008, available online at http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

330 Regarding the historical evolution of the popular action in Portugal, *see* José Robin de Andrade, *A Acção Popular no Direito Administrativo Português*, Coimbra Editora, Coimbra, 1967, pages 6-14, Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 70 and 107-110, Paulo Otero, "A acção popular: configuração e valor no actual Direito português", *in Revista da Ordem dos Advogados*, ano 59, n.º 3, Dezembro de 1999, pages 872-874, António Payan Martins, *op. cit.*, pages 101-103, Luís Sousa Fábrica, *op. cit.*, pages 16-17, Mário José de Araújo Torres, "Acesso à justiça em matéria de ambiente e de consumo – legitimidade processual" *in Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 172-173, and Mariana Sotto Maior, "O direito de acção popular na Constituição da República Portuguesa", *in Documentação e Direito Comparado*, n.os 75/76, 1998, pages 247-249 and 251-253.

331 "*Ordenações Manuelinas*", livro I, título 46, § 2.º, "*Ordenações Filipinas*", livro 1, título 66, § 11.º, and Constitutional Chart of 1826, article 124.

reinforcement of the traditional popular actions and to the introduction of popular actions particularly (but not exclusively) designed to defend diffuse interests.[332]

As a result, according to Article 52, paragraph 3, of the Portuguese Constitution (in its current wording):

"Everyone shall be granted the right of popular action, either personally or via associations that purport to defend the interests in question, including the right of an aggrieved party or parties to apply for the corresponding compensation, *in such cases and under such terms as the law may determine*, in particular to:

- promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and cultural heritage;
- safeguard the property of the State, the Autonomous Regions and local authorities".

As we can see, the Constitution refers to cases and terms "as the law may determine". These cases and terms were generally determined by Law No. 83/95 of 31 August (Law of Popular Action), which we will now analyze in its main provisions.[333]

First of all, it is important to note that Popular Action Law primarily aims to protect such interests as public health, environment, quality of life, consumption of goods and services, cultural heritage and the public domain – these are the main interests envisaged by the law.[334]

The object of a popular action is especially the *diffuse interests*, that is the sharing by each subject of interests that belong to the community[335]. "Especially" but not

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332 *See* J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 7.ª edição, Almedina, Coimbra, 2003, page 510.

333 The Popular Action Law was preceded by an intense parliament debate with many projects of law being presented by the different political parties. Regarding this matter, *see* António Payan Martins, *op. cit.*, pages 103-110, Miguel Teixeira de Sousa, "A protecção jurisdicional dos interesses difusos: alguns aspectos processuais", *in Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 237-245, António Filipe Gaião Rodrigues, "Acção Popular", *in Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 251-253, Mário José de Araújo Torres, *op. cit.*, pages 176-180, M. Manuela Flores Ferreira, "Acesso colectivo à Justiça e protecção do meio ambiente", *in Ambiente e Consumo*, Centro de Estudos Judiciários, I volume, 1996, pages 359-362, and Rui Chancerelle de Machete, "Algumas notas sobre os interesses difusos, o procedimento e o processo", *in Estudos em memória do Professor Doutor João de Castro Mendes*, Lex, Lisboa, 1993, pages 651-662. Regarding the birth of the Popular Action Law, see, particularly, Rui Chancerelle de Machete, "Acção procedimental e acção popular – Alguns dos problemas suscitados pela lei nº 83/95, de 31 de Agosto", *in Lusíada – Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada – Porto, Porto, 1996, pages 263-270.

334 Article 1, paragraph 2, Popular Action Law.

335 *See* J.J. Gomes Canotilho / Vital Moreira, *Constituição da República Portuguesa Anotada*, volume I, 4.º edição, Coimbra Editora, Coimbra, 2007, pages 697-698.

exclusively, because it is clear that the Popular Action Law also extended its protection to *homogeneous individual interests and rights* (individual interests and rights shared by a certain number of individuals).[336]

This is one of the points where we can see an influence of the American class action model and of Brazilian law.

Regarding the types of popular action that we may have, Popular Action Law distinguishes between: (i) the right of popular participation in administrative procedures and (ii) the right of popular action to promote prevention, cessation or judicial prosecution of the offences referred to in the above-mentioned Article 52, paragraph 3, of the Portuguese Constitution.[337]

The first of these rights aims to guarantee to citizens and certain associations or foundations (promoters of public health, environment, quality of life, consumption of goods and services, cultural heritage and the public domain) a series of participation rights in administrative proceedings such as development plans, urban development plans, master plans and land use planning, location decisions and public works with relevant impact on the environment or on the economic and social conditions of the population.[338]

The second right (popular action) covers two different actions: an administrative popular action and a civil popular action.[339]

The administrative popular action comprehends the action to protect the interests mentioned in Article 1 (namely public health, environment, quality of life, consumption of goods and services, cultural heritage, public domain) and the judicial review of any administrative action affecting the same interests on grounds of illegality. It is also possible to resort to provisional remedies/interim measures when they prove to be adequate in ensuring the usefulness of the decision pronounced in the

336 *See* António Payan Martins, *op. cit.*, pages 115-118, Henrique Sousa Antunes, *op. cit.*, pages 6-7, footnote no. 16, José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, vol. III, Coimbra Editora, Coimbra, pages 113-114, "A acção popular e a protecção do investidor", *in Cadernos do Mercado de Valores Mobiliários*, n.º 11 (2001), CMVM,Lisboa, available online at http://www.cmvm.pt/CMVM/Publicacoes/Cadernos/Documents/7be560856f0844b2975f863ef9c2cb4bAccaoPopular.pdf), pages 3-10 and "A protecção do investidor", *in Direito dos Valores Mobiliários*, volume IV, Coimbra Editora, Coimbra, 2003, pages 22-29, Luís Sousa Fábrica, *op. cit.*, page 17, and Jorge Miranda / Rui Medeiros, *Constituição Portuguesa Anotada*, tomo I, 2.ª edição, Coimbra Editora, Coimbra, 2010, pg. 1039. *See* also António Filipe Gaião Rodrigues, *op. cit.*, page 249, and M. Manuela Flores Ferreira, *op. cit.*, page 358.

337 Article 1, paragraph 1, Popular Action Law. *See* J. J. Gomes Canotilho, *op. cit.*, pg. 511.

338 Articles 4 to 11, Popular Action Law.

339 Article 12, Popular Action Law. Regarding the administrative and the civil popular action, *see* José Lebre de Freitas, "A Acção Popular no Direito Português", *in Estudos sobre Direito Civil e Processo Civil*, volume I, 2.ª edição, Coimbra Editora, Coimbra, 2009, pages 221-223, Paulo Otero, *op. cit.*, pages 880-882, Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 132-141, and Henrique Sousa Antunes, *op. cit.*, pages 7 and 25.

administrative popular action. The action must be filed in an administrative court, against public entities (particularly, the State).

The civil popular action can take any of the forms set out in the Civil Procedure Code: declaratory, condemnatory or constitutive. There is also the possibility of requesting provisional remedies/interim measures (Article 26-A of the Civil Procedure Code). In any case, the action must be filed in a civil court, against private individuals or public entities acting outside of the administrative function.

According to Article 25 of the Popular Action Law, those who have a popular action right can also make a denunciation, complaint or participation to the Public Prosecutor if the interests included in article 1 (which are criminal in nature) are violated, as well as join proceedings.[340 – 341]

A popular action can be injunctive or remedial. As we have seen in Article 52, paragraph 3, of the Portuguese Constitution, it seeks not only to promote the prevention, cessation or judicial prosecution of the offences regulated in paragraph 3 [a)], but also to provide due compensation to the aggrieved party or parties (paragraph 3).[342]

We have already seen the types of popular action that we can have in Portuguese law. However, who can file a popular action?

According to Article 2 of the Popular Action Law (as well as the above-mentioned Article 52, paragraph 3, of the Portuguese Constitution), the answer is: *any citizen* in the enjoyment of their civil and political rights and *any association and foundation* which defend the interests referred to in Article 1, *whether or not they have a direct interest in the claim*. Municipalities/local authorities can also file a popular action when the litigation relates to interests held by those who are residents in the corresponding district.[343 – 344]

340 As Professors Miguel Teixeira de Sousa (*A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 132-133) and Henrique Sousa Antunes (*op. cit.*, page 7) correctly observe, this does not mean, however, that there is a "criminal popular action" – the referred denunciation, complaint or participation does not influence the criminal procedure.

341 Another controversial subject, is whether or not a "constitutional popular action" is possible. Denying such possibility, *see* J.J. Gomes Canotilho / Vital Moreira, *op. cit.*, page 697. In the affirmative, *see* Paulo Otero, *op. cit.*, page 879, footnote no. 16.

342 *See* J.J. Gomes Canotilho / Vital Moreira, *op. cit.*, page 699, Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, page 149, and Henrique Sousa Antunes, *op. cit.*, page 25.

343 Article 2, paragraph 2, Popular Action Law.

344 According to some Authors, the reference to "citizens" in article 2, paragraph 1, of the Popular Action Law, also include foreigners – *see* J.J. Gomes Canotilho / Vital Moreira, *op. cit.*, page 701, Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, page 178, and Jorge Miranda / Rui Medeiros, *op. cit.*, pages 1034-1035.

In any case, associations and foundations must have legal personality, they must expressly include in their assignments or in their statutory objectives the defense of interests related to the action in question and they cannot exercise any kind of professional activity concurrent with the activity of companies or independent professionals.[345]

Regarding this matter, it is also important to emphasize the role of the Public Prosecutor ("Ministério Público"). According to Article 16, the Public Prosecutor is responsible for protecting legality and representing the State (when it is a party), absent parties, minors and other persons with lack of capacity (whether they are plaintiffs or defendants), as well as other public legal persons in the situations provided for in the law. The Public Prosecutor may also replace the claimant in case of withdrawal from the suit, settlement or behavior that is harmful to the interests in question.[346]

As we can see, the right to file a popular action is quite broad – any citizens (...), "whether or not they have a direct interest in the claim" (Article 2, paragraph 1). It is also important to note that there is no mechanism of previous certification regarding the legitimacy to take action[347]. The law does not foresee a test to the popular action like the one contemplated in the Rule 23, (a), of the American Federal Rules of Civil Procedure[348]. Nevertheless, some Authors sustain that there must be a connection with the object of the popular action and with the right/interest harmed, and that parties must have been affected by the same or similar conduct.[349]

One of the most important and controversial matters of the Popular Action Law is the special regime of representation contemplated in Articles 14 and 15 (*opt-out principle*), as well as the res judicata effect in Article 19. There is a clear influence of the American class actions model here.

According to Article 14, the claimant represents on his own initiative – without the need for a mandate or express authorization – all the other holders of the rights or interests in question who have not exercised the right to exclude themselves, provided for in Article 15 (*opt-out principle*). Therefore, if someone does not want to take part in the proceedings and be represented by the plaintiff they must declare so. Otherwise, they will be bound by the result of the litigation (with the few exceptions provided for in Article 19, as we will see).

345 Article 3, Popular Action Law.
346 Article 16, paragraph 3, Popular Action Law.
347 *See* Tito Arantes Fontes / João Pimentel, *op. cit.*, page 123, paragraph 1.6.
348 *See* Henrique Sousa Antunes, *op. cit.*, page 23.
349 *See* Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 215-220, José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, *op. cit.*, pages 116-117, and Tito Arantes Fontes / João Pimentel, *op. cit.*, page 123, paragraph 1.6.

Portugal has, therefore, adopted an *opt-out* principle; which is not the standard situation of many other countries (European and non-European) that have followed an opt-in approach.[350]

The *opt-out* principle works as follows: after the popular action has been submitted to the court, the judge will summon the interested parties so that, within the time frame fixed, (i) the parties confirm if they wish to join the proceedings (accepting the proceedings at whatever stage they are) and (ii) if they accept being represented by the claimant. Silence of the parties will be interpreted as acceptance of the representation. Still, it is important to note that the interested parties can refuse representation up until the end of the production of evidence, or at an equivalent stage, by an express declaration in the proceedings.[351]

The summons will be made via one or various announcements made public by the media or by public notice, whether referring to general or geographically localized interests. In any case, the law does not require personal identification of those to whom the advertisement is directed. It is sufficient for the summons to refer to them as holders of the interests at stake, mentioning, also, the action in question, the identity of the claimant, or at least of the first claimant where there are several, the identity of the defendant or defendants, and sufficient reference to the claim and the reason behind it. Where it is not possible to specify individual holders, the summons use the circumstance or characteristic that is common to all of them, such as the geographical area in which they reside or the group or community that they make up.[352]

Finally, the key point in all of this is the res judicata effect, which differs from the general regime of civil procedure. According to Article 19, paragraph 1, the final decisions rendered in administrative actions or appeals or in civil actions have "general effects" (*erga omnes* – towards all), except if they are dismissed for insufficient evidence or when the judge should decide differently consideing the actual motivations of the case. In any case, the holders of interests or rights who have exercised the right to exclude themselves from representation (opt-out) will not be bound by the "general effects" of the res judicata.

After the decisions have become *res judicata* they will then be published at the expense of the losing party in two newspapers that interested parties are presumed to read, to be chosen by the judge. The judge can also decide that publication is

350 *See* Gabrielle Nater-Bass, "Class Action Arbitration: A New Challenge?", available online at http://www.homburger.ch/fileadmin/publications/CLASSACT_01.pdf, page 14 (paragraph II, B.). For a distinction between the opt-in and the opt-out principles, *see* Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 209-211.

351 Article 15, paragraphs 1 and 4, Popular Action Law.

352 Article 15, paragraphs 2 and 3, Popular Action Law.

restricted to the essential aspects of the case, when the extension of the decision suggests that.[353]

This special regime of representation (*opt-out*), combined with the *res judicata* effect (*erga omnes*), has been heavily criticized by some authors;[354] one of them is that an *inter partes* effect would compromise the effectiveness of the popular action.[355] However, as Lebre de Freitas observes, this regime can have severe consequences to the holder of the interest (particularly in case of a diffuse interest) since in principle he will not be able to file another action with the same object if the defendant is acquitted.

The main problem is that the law does not require personal identification of those to whom the writ of summons is directed (which, of course, would be very difficult or even impossible). As we have seen, the summons is made via one or various announcements made public through the media or public notice, which may not be sufficient to reach its intended recipients... And the risk is even higher since anyone (any citizen, as well as certain associations and foundations) can file a popular action[356] – the legitimacy criterion is quite broad. Therefore, there is the possibility that someone is being represented in a popular action without even knowing it, with the relevant consequence of being bound by the judgment, since he hasn't opted out. It is also important to recall that the Popular Action Law does not foresee an adequacy of representation criteria as the one contemplated in the Rule 23, (a), of the American Federal Rules of Civil Procedure.[357]

As Lebre de Freitas also sustains, it is true that (i) the Public Prosecutor may replace the claimant in the case of withdrawal from the suit, settlement or behavior which is harmful to the interests in question and (ii) the judge can collect evidence on his own initiative (within the key issues defined by the parties).[358] However, as the Author affirms, this type of precautions may not take place and may reveal themselves insufficient to protect the interests at stake.[359]

353 Article 19, paragraph 2, Popular Action Law.

354 *See* José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, pages 215-219 and "A acção popular ao serviço do ambiente", *in Lusíada – Revista de Ciência e Cultura*, série de direito, número especial, Actas do I Congresso Internacional de Direito do Ambiente da Universidade Lusíada – Porto, Porto, 1996, pages 238-241, António Payan Martins, *op. cit.*, pages 112-117 and 128, José de Oliveira Ascensão, *Direito Civil. Teoria Geral*, *op. cit.*, pages 117-118, and Luís Sousa Fábrica, *op. cit.*, pages 17-18.

355 *See* Miguel Teixeira de Sousa, A legitimidade popular na tutela dos interesses difusos, *op. cit.*, page 273.

356 *See* José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, page 217.

357 *See* António Payan Martins, *op. cit.*, page 112, Henrique Sousa Antunes, *op. cit.*, page 23, and Ada Pellegrini Grinover, *op. cit.*, page 250.

358 Article 16, paragraph 3, and article 17, Popular Action Law.

359 *See* José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, page 218 and "A acção popular ao serviço do ambiente", page 240.

As we have previously stated, a popular action can be injunctive or remedial. Regarding the liability of the agent[360], it should be emphasized that the law distinguishes between: (i) subjective civil liability, (ii) objective civil liability and (iii) criminal liability.

According to Article 22 (subjective civil liability), the party who, in a deliberate or negligent way, breaches the interests referred to in Article 1 will have to indemnify the injured party or parties for damages. The law establishes here a distinction between compensation for injury of the interests of unidentified holders (which are globally fixed) and of identified holders (calculated under the general terms of civil liability).[361] In any case, the right to compensation shall lapse three years after the final judgment that has recognized it.[362]

There is also an obligation to indemnify for damages, regardless of fault, when an action or failure to act by an agent breaches the relevant rights and interests or results from dangerous activity (objective civil liability).[363]

Finally, those who have a right of popular action can also present a denunciation, complaint or participation to the Public Prosecutor if the interests referred to in Article 1 (which are of criminal nature) are violated, as well as join proceedings (criminal liability).[364]

Regarding the costs of popular action, first of all it is important to take notice that prepayment of costs is not required. Also, in the event that the claim only partially proceeds, the plaintiff is exempt from the payment of costs. If, however, there is a total failure of the claim, the plaintiff is responsible for an amount to be determined by the judge, somewhere between 10% and 50% of the costs normally be due, depending on his financial situation and on the material or procedural reason for dismissal of the action.[365]

Also, according to Article 21, the judge in the case will decide on the legal costs, depending on the complexity and the amount in question.

360 *See* José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, pages 219-221, and Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 153 and following, António Payan Martins, *op. cit.*, pages 118-124, and Tito Arantes Fontes / João Pimentel, *op. cit.*, page 124, paragraph 1.10.

361 Article 22, paragraphs 2 and 3, Popular Action Law. Regarding this controversial distinction, *see* Henrique Sousa Antunes, *op. cit.*, pages 26-27, and Miguel Teixeira de Sousa, *A legitimidade popular na tutela dos interesses difusos*, *op. cit.*, pages 165-175.

362 Article 22, paragraph 4, Popular Action Law.

363 Article 23, Popular Action Law.

364 Article 25, Popular Action Law.

365 Article 20, paragraphs 1, 2 and 3, Popular Action Law.

So far, we have been describing the popular action law in its main features. But what about its application by the courts? Are there many popular actions being filed?

The truth is that this mechanism is not very common in Portugal and has been little used in practice.[366] The majority of the popular actions brought refer to the protection of environmental rights, public works or goods of the public domain. Nowadays, most consumer litigation has been brought before consumer arbitration centers.

Finally, it is important to notice that, although Law No. 83/95 (Popular Action Law) contains the general provisions applicable to the popular action, this does not mean, however, that there cannot be other specific provisions (of a procedural nature) contemplated in special legislation that also regulate collective protection[367]. This is the case, for example, in:

- Law No. 24/96, of 31 July (Consumer Protection);[368]
- Law Nno. 11/87, of 7 April, subsequently amended (Framework Law on the Environment);[369]
- Decree-Law No 446/85, of 25 October, subsequently amended (General Contractual Terms);[370]
- Law No. 107/2001, of 8 September (Protection of the Cultural Heritage)[371]; and
- Decree-Law No. 486/99, of 13 November, subsequently amended (Securities Code).[372-373]

366 *See* Tito Arantes Fontes / João Pimentel, *op. cit.*, page 124, paragraph 1.9, José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, pages 227-228, and Lisa Tortell, *op. cit.*, pages 2-3.

367 *See* José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, page 208. As a matter of fact, article 27 of the Popular Action Law expressly provides that "the popular action cases not covered by the provisions of this Act shall be governed by the rules that apply to them".

368 Regarding this law, *see*, for instance, José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, pages 208 and 224-226, and Henrique Sousa Antunes, *op. cit.*.

369 *See*, for example, Henrique Sousa Antunes, *op. cit.*., and José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, page 226.

370 *See*, for example, António Pinto Monteiro, "Contratos de adesão e cláusulas contratuais gerais: problemas e soluções", *in Estudos em Homenagem ao Prof. Doutor Rogério Soares*, Boletim da Faculdade de Direito da Universidade de Coimbra, Stvdia Ivridica, n.º 61, Coimbra Editora, Coimbra, 2001, pages 1103-1131, Henrique Sousa Antunes, *op. cit.*., and José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, pages 225-226.

371 *See* Henrique Sousa Antunes, *op. cit.*., and José Lebre de Freitas, "A Acção Popular no Direito Português", *op. cit.*, page 226.

372 *See* José de Oliveira Ascensão, "A acção popular e a protecção do investidor", *op. cit.*, and "A protecção do investidor", *op. cit.*, pages 13-40, Sofia Nascimento Rodrigues, A Protecção dos Investidores em Valores Mobiliários, Almedina, Coimbra, 2001, pages 57-67, Maria Elisabete Gomes Ramos, *O seguro de responsabilidade civil dos administradores (entre a exposição ao risco e a delimitação da cobertura)*, Almedina, Coimbra, 2010, pages 236-240, and Henrique Sousa Antunes, *op. cit.*.

373 It should also be emphasized that there was a preliminary project for a Consumer's Code, which would simplify the provisions regarding collective protection of the consumer and would revoke the statutes on general contractual terms and consumer protection. The Draft Bill, however, has not yet been approved. *See* Henrique Sousa Antunes, *op. cit.*, pages 29-31.

3. Class Actions Arbitrations in Portugal?

After analyzing the Portuguese-specific system of class/group actions, the question that we should now ask ourselves is whether or not it is possible to have a "*class arbitration*" in Portugal – also known as "*class action arbitration*", a "procedure which combines elements of US-style class actions (i.e., large-scale lawsuits seeking representative relief in court on behalf of hundreds to hundreds of thousands of injured parties) with arbitration".[374]

In other words (more appropriate to Portuguese Law), can we have a popular action in arbitration? Although the question is simple, the answer is certainly not... Being the leading country in the area of group actions[375], it comes as no surprise that it was in the United States that this interesting topic of class arbitrations first arose. Nevertheless, this was and still is a controversial issue, both in- as well as outside the US; which is perfectly understandable since, as Eric P. Tuchmann rightfully put it, class actions and arbitration seem at first sight to be mutually exclusive processes[376]. On the one hand, we have class action litigation, a large, complex judicial process, sometimes heavily criticized for permitting abusive lawsuits[377]. On the other hand, we have arbitration, an alternative dispute resolution method characterized by its consensual nature (party autonomy), confidentiality, informality and flexibility.

Despite the controversy, the truth is that class actions made their way into arbitration and it seems that they are here to stay.[378] However, up until now this has been seen more as an "American issue". And, as far as we know, there are certainly no "class arbitrations" in Europe.[379]

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374 S. I. Strong, "Class arbitration outside the United-States: reading the tea leaves", *in Multiparty Arbitration*, Dossiers VII, International Chamber of Commerce, Paris, 2010, page 183.

375 *See*, for instance, Bernard Hanotiau, *Complex Arbitrations – Multiparty, Multicontract, Multi-issue and Class Actions*, Kluwer Law International, the Hague, 2005, page 258.

376 Eric P. Tuchmann, "The administration of class action arbitrations", *in Multiple Party Actions in International Arbitration*, edited by the Permanent Court of Arbitration, Oxford, 2009, page 327.

377 On the criticism that it is sometimes made to the American class actions, *see* Gabrielle Nater-Bass, *op. cit.*, pages 6-7 (paragraph II, A., 4.).

378 As it is well known, although class action arbitrations already existed in the United States earlier, it was particularly with the famous *Green Tree Financial Corp. v. Bazzle* that they became a reality. Regarding this case and its famous Supreme Court's 2003 decision, *see*, for example, Bernard Hanotiau, *op. cit.*, pages 264-266, Nigel Blackaby / Constantine Partasides / Alan Redfern / Martin Hunter, *Redfern and Hunter on International Arbitration*, fifth edition, Oxford, 2009, pages 154-156, and Eric P. Tuchmann, *op. cit.*, pages 327-329.

379 Although it is true that there are no "class arbitrations" in Europe, it must be emphasized that collective redress seems to be on the agenda of the European Commission. As some Authors correctly observe, there is a recent interest on collective redress "not only on Member State level, but also on the European supranational level" – Philippe Billiet, "Recent collective redress initiatives in Belgium; what is the role of arbitration?", unpublished, page 1. We refer, particularly, to the Consumer Policy Strategy 2007-2013 in which the Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers. The first conclusions can be found on http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm. Regarding this matter, see particularly

What about Portugal? Portugal is no exception. So far, there is not a single case of a popular action in arbitration. This topic has never even been really discussed by scholars or arbitration experts. Still, the question remains whether this is even possible.

Approved on December 14 2011, and entered into force on March 14 2012, the new Portuguese Arbitration Law says nothing on the matter[380]. In any case, there are some aspects in the new law with relevance to the class arbitration topic that are worth emphasizing.

First of all, the new arbitration law is clearly the result of a friendlier environment in Portugal towards arbitration, which can be seen at various levels: political, jurisprudential, practical, academic, etc.

The law also confirms that Portugal is a "UNCITRAL country", since it draws heavily from the UNCITRAL Model Law. Still, the new legislation also attempts to incorporate lessons learned from other countries' recent legislative changes, as well as past Portuguese experience.

That being said, two innovations deserve a reference here. One of them concerns the criterion of arbitrability. According to previous arbitration law, this criterion was the disposability of the rights[381]. With the new law, it has clearly become wider, since it is now possible to submit any dispute concerning patrimonial rights to arbitration. Yet even non-patrimonial rights may be subjected to arbitration, as long as the parties are able to settle them.[382]

Philippe Billiet, "Recent collective redress initiatives in Belgium; what is the role of arbitration?", *op. cit.*, pages 1-2 and "Class arbitration in the Netherlands, Belgium and the US: a comparative overview", unpublished, pages 1-2, and also S. I. Strong, "Class and Collective Relief in the Cross-Border Context: A Possible Role for the Permanent Court of Arbitration", *in Hague Yearbook of International Law*, volume 23 (2010), Martinus Nijhoff Publishers, Leiden-Boston, 2011, pages 113-114 and 122-124.

380 Law No. 63/2011, of 14 December. For a commentary on the new law, *see* José Miguel Júdice, "The new Portuguese Arbitration Law", *in ASA Bulletin*, volume 30, no. 1, Kluwer Law International, 2012, pages 7-12, José Miguel Júdice / Diogo Duarte de Campos, "The new Portuguese arbitration law", *in International Bar Association*, vol. 17, no. 1, March 2012, pages 55-57, and Armindo Ribeiro Mendes / Dário Moura Vicente / José Miguel Júdice / José Robin de Andrade / Pedro Metello de Nápoles / Pedro Siza Vieira, *Lei da Arbitragem Voluntária Anotada*, Almedina, Coimbra, 2012.. An unofficial English translation of the law is available at http://arbitragem.pt/legislacao/index.php.

381 According to this previous criterion, arbitration could not apply to disputes concerning non-disposable rights and any arbitration agreement to that effect would be invalid. Nonetheless, there was still some case law and academic opinion which sustained that in such cases the invalidity of an arbitration agreement relates only to those rights which are absolutely non-disposable, not to those which are relatively non-disposable, such as rights that involve an economic interest – these would be arbitrable. *See*, José Miguel Júdice / António Pedro Pinto Monteiro, "Court rules on objective arbitrability and non-disposable rights", *in International Law Office*, March 2011.

382 Article 1, paragraphs 1 and 2, Portuguese new Arbitration Law.

The second innovation that should be particularly emphasized here is the multi-party arbitration provision. According to Article 11, all claimants and/or all respondents should by common agreement choose a common arbitrator, after which the arbitrators thus chosen will designate a presiding arbitrator or chairperson. If, however, the interests of an individual claimant or respondent are in conflict with those of its co-claimant(s) or co-respondent(s), the appointment of these parties or all the arbitrators shall revert to a state superior court (appeal court). In any case, these are only default rules – the parties are free to decide otherwise in their arbitration agreement.[383]

We have seen that Portugal has what might be called a class action mechanism (the popular action). It also has a new arbitration law which reflects the friendlier environment in Portugal towards arbitration. Can these two combined factors be sufficient to have class action arbitration?

The truth is there are some obstacles that lead us to the conclusion that, if not impossible, the admission of a popular action in arbitration is highly unlikely – at least, under current legislation.[384]

The first problem, in our opinion, is always the consensual nature of arbitration. Consent is the cornerstone of arbitration. With the special regime of representation contemplated in Articles 14 and 15 (*opt-out principle*), and the res judicata effect in Article 19 of the Popular Action Law, it will be very difficult to admit a class action arbitration (or popular action in arbitration). There is the serious risk that someone would be represented without him being aware of it, with the relevant consequence of being bound by the judgment, since he hasn't opted out. We cannot close our eyes to the question of consent.

It is also not clear that under the current Popular Action Law this could be possible. The law merely refers to an administrative and a civil popular action – not an arbitral popular action [385]. So without special legislation on the subject, it is clearly difficult to sustain the possibility of a popular action in arbitration. Furthermore, as far as we know, there are no arbitral institutions in Portugal foreseeing class action arbitrations or discussing such possibility.

There are usually also problems of arbitrability and due process (particularly, in what concerns the appointment or arbitrators). Nonetheless, as previously referred,

383 The new law also foresees third party intervention on article 36. However, these third parties must have signed the arbitration convention.

384 Regarding the obstacles that are usually pointed out to European class action arbitration, *see* Gabrielle Nater-Bass, *op. cit.*, pages 23-31 (paragraph IV).

385 *See* article 12. Also, on article 19, paragraph 1 of the Popular Action Law, reference is made to the "final decisions rendered in administrative actions or appeals or in civil actions", without considering the possibility of an arbitral action.

in light of the wide arbitrability criterion and of the special multi-parties provision contemplated in the new arbitration law[386], this might not constitute a particular problem in Portugal.

The obstacles referred so far are already sufficient for us to anticipate that a popular action in arbitration *per se* would provide many possibilities to appeal or to present an application for setting aside the arbitral award (annulment). For instance, under the current Portuguese opt-out system, the party who did not receive notice of the popular action will probably challenge the award claiming that there was a violation of his right to be heard.[387]

Furthermore, as Gabrielle Nater-Bass correctly observes, there are also recognition and enforcement uncertainties, particularly in the New York Convention.[388]. Article V, paragraph 1 (b), for example, could present some difficulties in an opt-out system like the Portuguese one – the non-present class member could always argue that he was not given proper notice of the arbitration.

There are also other reasons to presume that it is not likely to have a popular action in arbitration. It is well known that in the United States class arbitration arose "after corporate entities that were concerned about being named as defendants in judicial class actions began including arbitration provisions in their contracts so as to force individual claimants to pursue relief in arbitration".[389] By doing this, they thought that they could avoid class actions, because class actions and arbitration did not seem compatible with each other. As we all know, they thought wrong... The important point that must be emphasized is that in Portugal this concern simply does not exist. As previously referred, popular action is not very common in Portugal and has been little used in practice. Therefore Portuguese corporate entities are probably not worried about this (at least for now). It is unlikely that we might see arbitration provisions in standard agreements with the intent of avoiding popular action.

There are also some cultural legal differences between Portugal and the United States that discourage the practice of collective litigation in Portugal[390], therefore reducing the chances of having a class action arbitration. We refer particularly to the prohibition of remuneration for lawyers according to the system of *quota litis*

386 Article 1, paragraphs 1 and 2, and article 11, respectively, of the Portuguese new Arbitration Law.

387 Article 46, paragraph 3, a), (ii) combined with article 30, paragraph 1, Portuguese new Arbitration Law. On this subject, *see* Gabrielle Nater-Bass, *op. cit.*, page 29 (paragraph IV, C.).

388 *See* Gabrielle Nater-Bass, *op. cit.*, page 29 (paragraph IV, C.). On this subject, see also S. I. Strong, "From Class to Collective: The De-Americanization of Class Arbitration", *in Arbitration International*, vol. 26, no. 4, 2010, Kluwer Law International, pages 523-547.

389 S. I. Strong, "Class arbitration outside the United-States: reading the tea leaves", *op. cit.*, page 197. *See* also, for instance, Bernard Hanotiau, *op. cit.*, page 264, and S. I. Strong, "From Class to Collective: The De-Americanization of Class Arbitration", *op. cit.*, page 498.

390 *See* Henrique Sousa Antunes, *op. cit.*, pages 1 and 14.

(the no win, no fee agreement) and, in some point, the extensive limits on lawyers' advertising[391]. It is also important to notice that punitive damages are not available.

Considering the above-mentioned, we are not very optimistic on the possibility of class action arbitration in Portugal.

The situation could be different, however, if there was special legislation on the subject. As previously indicated, Popular Action Law contains general provisions applicable to the popular action. Alongside this law there is special legislation that also regulates collective protection. As a matter of fact, Article 27 of the Popular Action Law expressly provides that "the popular action cases not covered by the provisions of this Act shall be governed by the rules that apply to them". Consequently, special legislation is the best way to prepare the way for the first popular action in arbitration.[392]Institutional arbitral centers (particularly in consumer disputes) can also play an important role. By providing special rules, they could boost "class action arbitrations" as the American Arbitration Association (AAA) and the Judicial Arbitration and Mediation Services (JAMS) did in the United States.[393]

Therefore, although at present it does not seem possible to file a popular action in an arbitral tribunal, in the future – with specific legislation on the subject – the situation might be different.

4. Conclusion

Class actions have always been a synonym of controversy. They are as criticized as they are acclaimed. Therefore, it is really not surprising that the rise of *class action arbitration* has become even more controversial.

Independently of this, the truth is that class arbitration is already a reality. The question now is how far it will expand from the United States.

391 Articles 101 and 89 of the Bar Association Statute – Law 15/2005, of 26 January, with the subsequent amendments.

392 Following article 52, paragraph 3, of the Constitution, it can be said that the Constitution allows a popular action to be filed in "*any court*" (*see* J.J. Gomes Canotilho / Vital Moreira, *op. cit.*, page 697, and António Filipe Gaião Rodrigues, *op. cit.*, page 250). Since an arbitral tribunal is a court (and is expressly considered as such in article 209, paragraph 2 of the Constitution), there seems to be no constitutional obstacle to considerer the possibility of a popular action being filed in an arbitral tribunal. On the constitutional nature of the arbitral tribunal, *see* António Pedro Pinto Monteiro, "Do recurso de decisões arbitrais para o Tribunal Constitucional", *in Revista Themis*, ano IX, n.º 16 (2009), Almedina, Coimbra, 2009, pages 194-201.

393 On the subject, *see*, for example, Eric P. Tuchmann, *op. cit.*, pages 329-331, Richard Chernick, "Class-wide arbitration in California", *in Multiple Party Actions in International Arbitration*, edited by the Permanent Court of Arbitration, Oxford, 2009, pages 342 and 345-350, Bernard Hanotiau, *op. cit.*, pages 277-279, and Gary B. Born, *International Commercial Arbitration*, volume I, Wolters Kluwer, Alphen aan den Rijn, 2009, page 1231.

We have seen in the present paper that Portugal is not new to class action mechanisms – popular action can be qualified as one. There is also a new arbitration law, which reflects the friendlier environment towards arbitration.

All things considered, it might appear that Portugal would be on its way to have class action arbitrations. However, as discussed before, this may not be sufficient.

In any case, we do not believe that this may be impossible. With the proper legislation and institutional arbitration centers providing for special rules, combined with the friendly environment towards arbitration that already exists, class action arbitrations in Portugal could only be a matter of time.

Class Actions and Arbitration Procedures – Spain

Bernardo M. Cremades & Rodrigo Cortés

1. Overview of the Relevant Rules

The Anglo-Saxon concept *class action* and, more specifically, that of *class arbitration* does not have an exact equivalent in Spanish law. In Spanish law, there are analogous concepts such as the collective consumer arbitration and, to a lesser degree, statutory arbitration- comparable to the Anglo-Saxon *class action*.

As a consequence of this absence of the *class action* and the *class arbitration* concept, Spanish legislation in the area of collective actions is limited and undeveloped. With respect to this concept, the most relevant laws are:

- Royal Decree 231/2008, of 15 February, regulating the Consumer Arbitration System (RD 231/2008)
- Law 60/2003, of 23 December, on Arbitration (LA)
- Law 1/2000, of 7 January, on Civil Procedure (LEC)
- Legislative Royal Decree 1/2007, of 16 November, restating the General Law for the Protection of Consumers and Users and other complementary laws ("Consumers Act of 2007")

2. Brief Overview of the National Class Action/Collective Redress System

2.1. Class Actions – A Historical Perspective

It is well known that class actions originated in Anglo-Saxon law. The Federal Equity Rule 38 of 1912 defined class action for the first time, identifying three requisites: [394]

- Impossibility for all individuals belonging to the class to participate in the legal action;
- Appropriate representation of this class by the person conducting the action.;

[394] Ribón Seisdedos, *"El Arbitraje de consumo colectivo"* in Manual Básico de Arbitraje de Consumo [Basic Manual of Consumer Arbitration], of the Confederación Española de Organizaciones de Amas de Casa, Consumidores y Usuarios (CEACCU) [Spanish Confederation of Organizations of Housewives, Consumers and Users].

- Existence of a question of fact or matter of law, common to all members of the class:

However, in the legal systems based on the Roman-Germanic tradition, such as Spain, there is traditionally no recognition of associations or groups – as legal subjects capable of initiating legal action – for the protection of collective interests. For this reason, it was not until Italian commentators began to take interest in the United States' *class actions* that this topic began to be studied in Europe.[395]

2.2. Collective Actions in Spain

Under Spanish law, the use of collective actions is very recent, and the application of this doctrine lacks uniformity and cohesiveness.

Various legislation in Spain, such as the General Law on the Protection of Consumers and Users of 1984 (Art. 20.1); the Organic Law 6/1985 on the Judiciary (Article 7.3); the Law 34/1988, of 11 November, on General Advertising (25.1); the Law 3/1991, on Unfair Competition (19.2); and lastly, the General Conditions of Contracts Law (19.3), envisions the possibility of consumer and users associations exercising legal action in their own interests or in the general interests of consumers and users by *both individuals and collective bodies*.

However, it was not until very recently that legal development of this concept was achieved with the passage of Law 1/2000, of 7 January, on Civil Procedure, which addresses "collective claims" for the first time in Spanish law.[396] Consumer arbitration has been well-received in the Spanish arbitration system. Many businesses have opted for this system, and they have subsequently submitted to consumer arbitration.[397]

Under Spanish law, there are three ways in which plaintiffs can combine their individual claims into one action:

Individual plaintiffs can join their claims into a single action while maintaining their status as individual complainants, similar to the way that plaintiffs in the United States can proceed by "joinder" under the U.S. Rules of Civil Procedure.

395 Carballo Piñeiro, Las Acciones Colectivas y su eficacia extraterritorial, Estudios de Derecho Internacional Privado nº 12 [Class Actions and their Extraterritorial Efficacy, Studies of Private International Law], Santiago de Compostela, 2009.

396 In Spain, the full scope of class actions is described in Article 11, 11*bis*, 13 and 15 of the LEC.

397 For a complete list, visit the Spanish National Institute of Statistics at http://www.ine.es/ss/Satellite?L=es_ES&c=TFichaIOE_C&cid=1259931134181&p=1254735038414&pagename=IOEhist%2FIOEhistLayout).

If several plaintiffs classified as "consumers or users" have been damaged by the same event or occurrence, they can form a "group" thereby joining their individual claims into a single action. This type of collective claim, however, must meet the following requirements:

- The individuals must be *consumers* or *users* (Art. 6 LEC);
- All members of the group must be identified and notified *before* the case is filed (Art. 15 LEC):[398]
- The group "must necessarily be constituted by the majority of those affected" (Art. 6 LEC).[399]

Individuals can present a joint claim as part of a legally constituted "association". An association is composed of an identified "group of consumers or users" that have been damaged by the same event or occurrence. An association has the capacity to "defend or protect the collective interests" of the harmed consumers or users. (Arts. 6 and 11 LEC).

Although the second type of claim is theoretically permitted under Spanish law, in practice, "collective claims" are usually brought by consumer associations (the third method).

2.3. Collective Action in Consumer Arbitration

The recognition of collective action in consumer cases did not materialize until the passage of the current RD 231/2008 regulating the Consumer Arbitration System, which was enacted pursuant to a regulation of the European Community. The suitability of consumer arbitration for the resolution of collective conflicts of consumers, brought by associations of consumers and users, is evident. The Administration, and the consumer associations themselves, actively promoted the use of consumer arbitration in response to the recommendations of the European Parliament,[400] as well as the European Commission,[401] for the out-of-court resolution of disputes regarding consumer matters. Despite some isolated criticism about the existence of collective rights, most commentators endorse its existence. Additionally, according to numerous authors, the Spanish Constitution recognizes the existence of collective rights.[402] Specifically, Art. 9.2 of the Spanish Constitution, establishes that "*it corresponds to the public powers to promote conditions so that the liberty and equality of the individual, and of the groups in which they are included, are real and effective*".

398 If members of the group are not capable of identifying the remaining members then before proceeding with the claim, they can request that the court issue a "pre-judicial decision" to provide assistance in the identification process. *Vid.* Art. 256 LEC.
399 This is known as the "50% plus 1" requirement.
400 Decision of 21 October 2000, Regulation (EC) no. 44/2001, of the Council.
401 Recommendation of the Commission of 4 April 2001.
402 López Calea ¿Hay derechos colectivos? [Are there collective rights?], Barcelona, 2000.

However, the recognition of the existence of collective interests serves no purpose if there are no mechanisms in place for its application in arbitration. We can establish, in accordance with the *Manual de arbitraje de Consumo* by Ríbón Seisdedos, five basic principles that justify the existence of collective actions:

- Avoiding multiple and potentially duplicate actions that may overwhelm the courts *(judicial economy);*
- The protection of general rights and interests cannot be satisfied in a series of numerous, individual consumer fraud actions;
- Avoiding inconsistent judgments.
- The equitable distribution of compensation among affected parties that could not be achieved if a corporation were forced to indemnify plaintiffs in a series of individual actions, where funds were inadequate to satisfy all of the judgments; and• Avoiding the imbalance of power between an individual consumer and a large corporation with a greater number of economic resources at its disposal.

Therefore, the utility of collective arbitration actions in consumer matters is indisputable. They can be initiated by the claimants to pursue one or more goals: (i) cessation or retraction of an unfair action; (ii) obtaining a declarative judgment for the purpose of establishing the rights of the parties; or (iii) awarding damages.

Notwithstanding the above, not every claim in consumer matters can be submitted to arbitration[403]. Such exceptions are set forth in Art. 2.2 of the RD 231/2008:

The questions on which a firm and definitive judicial decision has been given, except on the aspects relating to its execution.

- Matters intrinsically linked to others where private parties do not have power of disposition;
- Matters in which, according to legislation, the Public Prosecutor's Office must intervene in the representation and defence of those who lack capacity to act or cannot represent themselves in court;
- Matters relating to intoxication, injury, death or when there are reasons to believe that a criminal offence has occurred.

[403] In this regard, Marín López, Objeto y límites del arbitraje de consumo, en *Cuadernos de Consumo, 2005, nº 23,* [Purpose and Limits of Consumer Arbitration, in *Consumer Notebooks*] of the Consumer Directorate of the Government of Aragon, pp. 151 to 166, in the monographic issue on the *Curso mediación y arbitraje. Nuevos retos del arbitraje de consumo* [Mediation and arbitration Course. New Challenges for Consumer Arbitration], that includes the conferences given in the Course that were presented in Zaragoza from the 3 to 5 November 2004.

2.4. Collective and Diffuse Interests

As some questions related to consumers and users cannot be submitted to arbitration, it is essential to analyze the distinction between collective and diffuse interests.

The Spanish legislature has adopted the terms of "collective actions" instead of the Anglo-Saxon term "class actions" or "group actions". Included in this section are matters referring to *collective interests* per se and to *diffuse interests*.

Collective interests are those affecting a group of individuals, identifiable or readily identifiable. This easy identification of the members is what is truly relevant. This is the case, for instance, with a group of persons (consumers) that have entered into a contract for certain services.[404] However, the problem arises when that group of consumers cannot be identified *a priori*[405] insofar as there is no factual evidence of a relationship between the consumer or user and the service provider. In that instance, we would find ourselves in a case involving diffuse interests. [406].

At first, it would seem that both the defence of collective interests, as well as of the diffuse interests, could fit under the umbrella of collective arbitration; however, the wording by the Legislature of Article 56 of RD 231/2008[407] limits the scope of collective arbitration to disputes that may have caused damage to the collective interests of a determined or determinable number of consumers and users. Therefore, collective consumer arbitration does not afford protection to the diffuse interests listed in Art. 11.3 LEC, but only encompasses the collective interests articulated in Art. 11.2 LEC[408].

As a result, it is only possible to exercise collective actions via consumer arbitration with respect to collective interests (not diffuse interests), because of the inherent difficulty (and sometimes impossibility) of identifying the harmed individuals or entities which, in the end, are those that should express their consent to submit their disputes to arbitration.

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404 In the words of Carballo Piñeiro, "the diffuse interests would affect a non-determinable group [ ] they refer to those rights that cannot be attributed to anyone in particular and that are identified with the common good, insofar as the second [the collective interests] although also general, are predicated on an identifiable group, recognizable as such.

405 Montón Garcia, *Acciones colectivas y acciones de cesación,* [Collective Actions and Injunctions] Madrid, 2004.

406 Case: *Yellow Cab (*J.i.v. Yellow Cab Co. of Calif, 13 Cal. 3d 804, 532 P2d 1226 [1975])

407 "The purpose of collective consumer arbitration is to decide in a single consumer arbitration the disputes that, based on the same factual presupposition, have damaged the collective interests of consumers and users, affecting a determined or determinable number of them."

408 Certain authors reject even the possibility of hearing collective actions through arbitration channels, as a consequence of the fact that a final decision on an action would eliminate the individual right of those who did not intervene as a party to the previous proceedings to have recourse to the arbitral process. (Marín López, Objeto y límites del arbitraje de consumo [Purpose and Limits of Consumer Arbitration]).

3. Class Actions / Collective Redress and Arbitration

During the previous regime on the consumer arbitration system (RD 636/1993), and before the enactment of the LEC in the year 2000, legal commentators were practically unanimous in denying the possibility of collective actions pursued in consumer arbitration[409]. However, the language of the new Royal Decree (RD 231/2008) expressly acknowledges the possibility of filing collective arbitration actions in consumer arbitration in Section 2, Chapter V (entitled "Collective Consumer Arbitration"),

Having thus established the possibility of collective arbitration in the consumer protection context, we will now analyze the corresponding rules of procedure.

3.1. The Class Arbitration Procedure

3.1.1. Standing for filing collective arbitration actions

As previously explained, it is only possible to engage in collective arbitration within the scope and limits of the law of consumers and users. In this regard, article 58.1 RD 231/2008 sets forth two ways in which to commence the action:

- At the initiative of the chairman of the Competent Consumer Arbitration Board.
- At the request of the representative associations of consumers and users,[410] or Arbitration Boards at the place in which the damage to the collective interests of consumers occurred.

The fact that Art. 58.2 reduces the exercise of arbitration in defence of the collective interests to the representative associations of consumers considerably limits its application in practice. Article 24 of Consumers Act of 2007 states in this regard:

> *Only associations of consumers and users constituted according to the provisions of this law and regional laws that are applicable to them are capable of acting for and on behalf of the general interests of consumers and users.*

409 One of the problems posed during the time Royal Decree 636/1993 was in effect was precisely whether it was advisable or even possible to allow the same collective actions by a group of identifiable or readily identifiable consumers and a group of consumers that are not readily identifiable. Marcos Francisco, *El Arbitraje de consumo y sus nuevos retos*. [Consumer Arbitration and Its New Challenges] Ed. Tirant lo Blanch, Valencia, 2010, pp. 255-284.

410 Article 11.3 LEC states that the representative associations of consumers and users that form part of the Council of Consumers and Users shall have the legal consideration of representative associations of consumers and users unless the territorial scope of the conflict substantially affects one Autonomous Region, in which case the relevant legislation of that region will apply. See Carballo Piñeiro, *Las Acciones colectivas* ... [The Collective Actions...]

The groups or associations that do not meet the requirements under this law or under the regional laws that apply to them can only represent the interests of their members or of the association as a whole, but not the general, collective or diffuse interests of the consumers.

> *For the purposes of the provision of Article 11.3 of the Civil Procedure Act, those that form part of the Council of Consumers and Users shall have the legal consideration of representative associations of consumers and users, unless the territorial scope of the conflict substantially affects one autonomous region, in which case the relevant legislation of that region will apply.*

In addition to Art. 11.3 LEC and 24.2 of the Consumers Act of 2007 on the consideration of an Association of Consumers and Users as "representative", Law 44/2006 of 29 December, on the improvement in the protection of consumers and users, states that the Council of Consumers and Users will include the consumer and user associations of more than one autonomous region that are most representative,[411] according to different criteria (territorial implementation, number of members, experience in the protection of consumers and users, etc.). In practice, this means that currently, on the national level, only the associations that are members of the Council of Consumers and Users can submit to arbitration the defence of collective interests.

This limitation on standing, although it may appear exaggerated, ensures that the collective claim shall have sufficient support, guarantees the consistency and representative nature of the association making the claim, and acts as a filter for the severity of the claim.

However, there are criticisms of restricting standing to only "representative" associations.[412] The reason articulated is that it does not make sense to allow these associations to have standing but to deny requests for arbitration by any other association that may have knowledge of different parties who were be harmed by the same events. In addition, these critics argue that such a group of harmed parties is not allowed to file the claim, and thus cannot protect its individual interests.

3.1.2. Determination of the competent Arbitration Board

Although there is certain flexibility for determining the competent Arbitration Board (Art. 8 RD 231/2008)[413] in individual consumer arbitrations on requests for

411 Note that Spain is divided into Autonomous Regions, which, in turn, are divided into Provinces.

412 Marcos Francisco, ¿Es posible la tutela de intereses colectivos y difusos en al arbitraje de consumo? [Is the protection of collective and diffuse interests possible in consumer arbitration?]; Ribón Seisdedos, Manual Básico de arbitraje de consumo.

413 1. The Consumer Arbitration Board to which both parties, through common accord, submit the resolution of the conflict, shall be competent to hear the individual arbitration requests of the consumers or users.

collective arbitration, the competence falls exclusively on the Consumer Arbitration Board that has jurisdiction over the entire territory in which the consumers and users that may have been affected, reside.[414] The area of influence of the Consumer Arbitration Board may vary, and can extend to a province, region or, where applicable, to the entire national territory, in the event that those affected reside in more than one Autonomous Region (Art. 5.2.a) RD 231/2008), in which case the National Arbitration Board will be the competent authority.

3.1.3. Problems in determining the competent Arbitration Board

The first problem arises from the fact that RD 231/2008 does not take into account that all the consumers whose interests have been affected and, therefore, their place of residence may be unknown. No guidelines exist on how to proceed in such cases. However, in cases where the affected consumers from a certain area are identified – and thus a certain consumer arbitration board has jurisdiction – whether during the call phase or when the arbitration proceedings have already begun consumers can appear and file a request to intervene in the same proceedings, including those consumers who reside in areas outside the jurisdiction of the corresponding consumer arbitration board. In this situation, RD 231/2008 does not provide any rule, andso there is currently no solution to this problem.[415]

Similarly, another problem arises from those cases in which a collective conflict occurs; it does not concern the problem of new, affected parties appearing, as in the previous case, but rather it concerns those cases where it is not possible *ab initio* to precisely determine the territorial scope of the affected parties.

We could find ourselves in a situation in which, after filing a collective consumer arbitration in a certain province, one must publish a summons in the Official Gazette of that province; during this process –discussed in more detail below- new affected parties may appear from a different province. In that case, the Provincial Arbitral Board must decline jurisdiction in favour of the Regional Board, which in turn must publish a summons in its own Official Gazette. Moreover, even after publication in the Regional Official Gazette, affected parties may appear in a different Autonomous Region, which would mean that the National Arbitration Board would then have jurisdiction and therefore must proceed to make a summons in the Official State Gazette.

2. In the absence of an agreement between the parties, the territorial Arbitration Board in which the consumer has his residence shall be competent, except for the provision in the next paragraph. If, according to this criterion. there are several competent territorial Arbitration Boards, the one with the least territorial scope shall hear the matter.

414 "The consumer arbitration board that is competent in the entire territorial scope in which the consumers and users are residing, whose legitimate rights and economic interests may have been affected by the event, shall hear the collective arbitration proceedings." (Art. 57 RD 231/2008)

415 Marcos Francisco, D., *El Arbitraje de consumo y sus nuevos retos*. Ed. Tirant lo Blanch, Valencia, 2010.

As a result, there may be a delay of the proceedings lasting up to six months, something that does not correspond well with the presumed efficiency and speed of the arbitration process in general, especially consumer arbitration.

A possible solution to these problems, in the event of any doubt about jurisdictional scope, could be to give jurisdiction to the territorial entity to which the collective action belongs or, if necessary, to the competent Arbitration Board of the highest territorial area of influence, which would be the National Consumer Arbitration Board. Alternatively, the parties could agree to preliminary judicial clarification of the territorial scope.

3.1.4. Necessary acceptance of the arbitration by corporate entities

Following the request for initiation before the competent Consumer Arbitration Board, in accordance with Art. 58.2 of RD 231/2008, the chairman thereof will require the defendant companies or professionals to state, within fifteen days, whether they agree to submitting the resolution of the dispute (in a single collective proceeding) to the Consumer Arbitration System.

The company or professional (who has accepted the consumer arbitration system) is not required to submit to this procedure and is free to reject the offer to arbitrate, or to simply ignore it. In such a case, the proceedings will be closed and all Consumer Arbitration Boards informed (in order to avoid duplicity) as well as the person who filed the procedure (to allow the association to file the action in judicial channels if it is deemed appropriate). The rejection of the collective action does not mean that the company can avoid individual arbitral proceedings where there is an arbitration agreement with individual parties.

This rule is rightly criticized insofar as it is excessively favourable to the company which, having received and having studied the request for a collective action, would be in a position to act in its best interests, accepting the collective arbitration or rejecting it so as to avoid an enormous claim through the collective arbitration channel. Nothing would have prevented the RD from establishing the existence of collective consumer arbitration when the company has previously agreed to participate in the consumer arbitration system, with no further consent from the company required.

3.1.5. Summoning the injured parties

As discussed above, once the company has accepted the submission of the conflict to the consumer arbitration system, in accordance with Art. 59 RD 231/2008, the potential claimants must be summoned so that they may appear to assert their rights. This summoning is particularly significant given that a resolution of the conflict can affect third parties absent from the process.

Consequently, the publication of the proceeding acquires special importance and failure to make such publication may result in annulment actions. In other words, since this omission to notify may render the consumer defenceless, by applying the provisions of Article 238.3 of the Organic Law of the Judiciary, we can see that as a result of this failure to notify, consumers feel that their right to effective judicial protection (enshrined in Art. 24 of the Spanish Constitution) has been violated.

As a result, for the two months in which the notification process takes place, the proceedings are suspended, which can be reconciled by the fact that the period of six months to issue the award does not begin until this two-month period for the summons has elapsed.

There are different mediums for the notification process. However, it must necessarily be made to the Consumer Arbitration Boards, as well as through the publication in the Official Gazette corresponding to the territorial scope of the dispute. The Legislature leaves open the possibility of using other means of communication (newspapers, radio, television, Internet...). Indeed, the Legislature makes an implicit recognition of the ineffectiveness (for the purposes of practical knowledge) of the traditional means of judicial publication, disregarding communication by means of edict (as opposed to the LEC). In effect, the law departs from the traditional formality of the courtroom in order to achieve actual knowledge of the initiation of an arbitration procedure by the harmed consumer or user.

In this regard, Art. 17.2 Consumers Act of 2007, states:

> *"State-owned public social communication will dedicate space and programs, not advertisements, to inform and educate consumers and users. In such spaces and programs, in accordance with its content and purpose, access will be provided and participation will be afforded to the representative consumer and user associations and other groups or concerned sectors, in the form appropriate to these means."*

This possibility of access to State-owned public media is treated as an especially appropriate instrument for publicly notifying affected consumers, which, without a doubt, is much more effective than publication in an Official Gazette.

Therefore, the affected consumers and users that respond to the summons can intervene, asserting their rights in all the actions, either by adhesion to the collective arbitration request or by initiating their own individual actions.

3.1.6. Content of the notification

The notification to the affected parties must necessarily contain certain information. Pursuant to Art. 59.2 of the RD 231/2008, the summons must contain:

- an agreement for initiating the action by the chairman of the Arbitration Board;
- an indication of the place in which the relevant individuals or entities can have access to the proposed settlement agreement by the companies; and
- a warning of the effects set forth in Article 61 for filing a request for arbitration beyond the two month period.[416]

3.1.7. Publication expenses

This is not an insignificant issue because sometimes the expenses of publication in Official Gazettes or elsewhere can be high. As this is an inherent act to the proceeding, it seems evident that these expenses must be paid by the Administration that supports the arbitration proceedings.

3.1.8. Exception for collective arbitration and suspension of petitions

It is not uncommon that requests for individual arbitration are presented (simultaneously to a collective arbitration process) in different Arbitration Boards by harmed consumers and users. RD 231/2008 gives preference to the collective arbitration procedures over traditional or ordinary ones, as evidenced by the provisions of its Art. 60,[417] if the defendant company or professional so desires. Accordingly, for reasons such as procedural economy as well as ensuring legal certainty, and in order to avoid inconsistent awards from different proceedings, these individual arbitration requests will be suspended.

The wording of the cited article is clear, but that does not mean that there is no controversy. Such dispute arises because the defendant is at a huge advantage, insofar as it is permitted to move to dismiss, at any time, an individual arbitration as a result of a collective arbitration proceeding. This greatly disadvantages the individual consumer, whose action is officially stopped and subordinated to a collective action.

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416 Unlike judicial proceedings where those affected can intervene in the process at any time, in collective consumer Arbitration the damaged parties can only do so before the scheduled date of the hearing, since later petitions will not be admitted.

417 Article 60 states:
The notice of the acceptance by the companies or professionals to resolve in a single arbitration procedure the collective interests of the affected consumers and users suspends the process of individual arbitration petitions that are being filed for the same events, unless the actions of the arbitral tribunal have already started, in which case, the proceeding will be transferred to the competent Arbitration Board to hear the collective arbitration, in the period of 15 days from the notice of the acceptance. The claimant and respondent will be notified of the suspension and transfer agreement, if the arbitration petition had already been transferred as provided in Article 37.
2. Should the respondent oppose the exception of collective arbitration being carried out at any time during the procedure, including at the hearing, the arbitral tribunal will be prevented from hearing the case and will transfer the actions to the competent Consumer Arbitration Board to hear it, thereby terminating the collective action.

3.1.9. Petitions subsequent to the period granted in the summons

RD 231/2008 does not ignore the fact that it is possible that some requests for arbitration will be filed by users after the summons is made to the affected parties, in accordance with the procedures expressed in Article 59 RDSARC, after the two month period of publication in the Official Gazette has expired. In that case, Art. 61 determines that these requests should always be admitted, whenever they are filed prior to the date for the hearing.[418]

The decision on whether to admit these late petitions will be decided by the Arbitration Board with jurisdiction to hear the collective process, not the chairman of the Board. Interestingly, there is no mention of any appeal mechanisms, which means that the appeals would be limited to the cases specified in Art. 36 RD 231/2008. Initially, nothing would prevent an appeal before the Commission of Consumer Arbitration Boards of Art. 36. However, the time period for a decision on this appeal (3 months) does not correspond to the time period in which the collective consumer arbitration is held.

3.1.10. Time period for issuing the award

Since there is a two month period from the publication in the corresponding Official Gazette intended for the inclusion of as many consumers and users as possible in the collective arbitration procedure, there should be an extension of the period for issuing an award.

To ensure that public notification of consumers and users does not affect the maximum period for the issuance of the award, (six months from the date following the start of the arbitration procedure, per Art. 49 RD 231/2008, the same as for the common or ordinary arbitration), Art. 62 RD 231/2008 states that the calculation of this six-month period will not begin until the day following the end of the two months from the publication of the notification to the affected users. This is the same amount of time indicated in Art. 59.3 for the chairman of the Consumer Arbitration Board to designate the arbitral tribunal.

This phase, which takes place prior to the initiation of the period for rendering the award, is referred to as the *preliminary* phase and starts from the end of the two-month period following publication in the Official Gazette. In this phase of the proceeding, it is understood that the period for issuing the award "can be extended

[418] Ribón Seisdedos, *Manual Básico de Arbitraje de Consumo*: In harmony with Art. 38 of the Judiciary Act of the Public Administration and of the Common Administrative Procedure, the extemporaneous arbitration petitions presented by the affected users must be taken into account if they had been presented through any means provided in said article (other Administrations, Post Offices, diplomatic representations or consular offices...).

by a reasoned decision of the arbitral tribunal for another period of no longer than two months, unless the parties agree otherwise".

3.2. Publication vs. Confidentiality of the Award

Another example of the lack of detail of RD 231/2008 is the absence of any provision concerning the publication of the arbitration award of a collective consumer arbitration proceeding, which requires us to refer to Art. 221.2 LEC:In judgments upholding a stay to defend group interests and the diffuse interests of consumers and users, the Court, should it so deem, may order the judgements' total or partial publication at the defendants' expense or, where the effects of the infringement may persist over time, a rectifying statement.

The question presented here is who should request the publication: the tribunal ex oficio, or the claimant.

Obviously, the claimant may request, as part of the *petitum* of his suit, that eventually the award of being published, since there is no explicit reference in the entire civil procedural law excluding this request. Nevertheless, the LEC, which is applied as a supplement to consumer arbitration, cannot contradict the special characteristics of arbitration in general (where the principle of confidentiality is imposed on the arbitrators and the parties -Art. 24.2 LA[419]) or consumer arbitration (where RD 231/2008 in its Articles 22.1 and 41.2 RDSARC invokes a similar provision).[420]

In any case, there does not seem to be an obstacle for the plaintiff to request the publication of an award. However, it would be more helpful if future reforms to the consumer arbitration process addressed the publication of awards in greater detail.

3.3. Settlement During Class Arbitration

The possibility of reaching an agreement during the arbitration process is not only desirable but also a real possibility. In fact, Art. 58.2 RD 231/2008 says that once the offer to submit to collective arbitration is given to the respondent, the latter can propose a settlement agreement that could satisfy the rights of the potentially injured parties.

Independent of the possibility for a settlement in Art. 58.2, Art. 48.2 of the RD 231/2008 clearly states:

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419 The arbitrators, the parties and the arbitral institutions, where applicable, are required to maintain confidentiality as to the information they are exposed to during the course of the arbitration proceedings.

420 The arbitrators, the mediators, the parties and those providing service in the Consumer Arbitration Boards are also required to maintain confidentiality as to the information that they are exposed to during the course of the arbitration proceedings..

If, during the arbitration proceedings, the parties reach an agreement that completely or partially ends the conflict, the arbitral tribunal will consider the actions terminated with respect to the agreed- upon points, incorporating the agreement adopted into the award, unless it cites reasons to oppose it.

This provision is a literal transcription of Art. 36 of the Arbitration Act. Thus, an agreement between the parties will necessarily end in an award that will resolve the dispute and have the same effects as an award issued in a situation where no agreement had existed between the parties.

Additionally, 3.b) of Article 48 of the RD 231/2008, states that the arbitral tribunal shall consider its actions terminated and will issue the award ending the arbitration procedure without analyzing the merits "*when the parties agree to consider the actions terminated"*. This is a different situation than the previous one we encountered because here *there is no res judicata since there has been no decision on the merits of the case, and therefore,* the possibility of a subsequent, new arbitration proceeding still exists.

4. Exequatur of Class Awards

As illustrated above, Spanish law regulating collective actions and, more specifically, collective arbitrations is very new and underdeveloped. Many aspects of these class action procedures are not entirely clear, and there are different positions taken with respect to these procedures in the legal doctrine. An example is the exequatur procedure of class awards in Spain.

The exequatur of foreign awards in Spain is regulated both in the LEC 2000 and the previous LEC of 1881, as well as in the Law 60/2003 on Arbitration. Additionally, the New York Convention of 10 June 1958, which was ratified without reservations by Spain, is also applicable.

The main problem with granting exequatur to foreign awards in Spain (and, the main reason it is often denied) is determining if the award in question (in our case, a *class award*) is contrary to public policy, and therefore unenforceable in Spain.

Spanish law expressly defines the types of claims that can be considered "collective claims'' specifically referencing the claims of consumers and users, while excluding "corporate" claims.

The Consumers Act of 2007 draws a distinction between "consumers and users", as parties that can file collective claims, and "corporations," as parties that cannot file collective claims.

Contrary to the United States' *class action* model, the collective claims admitted by Spanish law permit multiple complainants that have filed similar claims arising from the same event to resolve their claims with a new joint claim, while maintaining their individual rights to intervene in the arbitral process when it is advantageous to do so. On the other hand, the system of class action claims in the United States, and other *common law countries,* is more extensive than the Spanish system[421], as it can be broadly applied to a wide-range of areas where, for example, it cannot be equally applied in Spain. Unfortunately, it is unlikely that this situation will change in the near future.

Spanish legislature has strictly limited the types of claims that can be litigated or arbitrated through the collective claims process. In fact, the legislature has categorically refused to expand the current collective claims system beyond what is currently known as groups composed of the "majority plus one" and "associations" in which the complainant maintains his individual rights and the ability to intervene in the arbitral process at any time.

The Spanish legal system rejects any type of representative dispute beyond the scope of the existing limited system of collective claims. The fact that the Spanish legislature consistently rejects enacting any type of U.S.-style representative litigation has greatly limited the types of collective claims that claimants can pursue. Essentially, this means that any *class arbitration* that resolves matters that could not be the subject of a collective action in Spain would raise public policy questions. Such public policy issues would prohibit the judicial recognition of a foreign award in Spain on the grounds that it violates the principles of the Spanish legal system, "which are entirely obligatory to ensure the preservation of social order among the people."[422]

Therefore, given their limited application and the low number of these claims in Spain, it is highly likely that a Spanish court would reject granting the exequatur of a foreign *class award* (understood in the traditional sense as an Anglo-Saxon class award) because it deals with something not recognized in the Spanish legal system. In other words, its recognition in Spain would constitute an infringement of public policy. This position, contrary to the exequatur, is maintained by several scholars who deny the possibility of exequatur of a judgment in a civil *class action*. The possibility of obtaining the exequatur of a *class award* (without a clear equivalent in Spain) is thus, at the very least, complicated.

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421 The "collective" dispute only exists in the areas required by the laws of the European Union related to the protection of the consumer and user. See LEC, Art. 6 ("The entities authorised pursuant to European Community Regulations to act in defence of the collective and diffuse interests of consumers and users"), which was approved according to the guidelines of the European Community "with respect to the protection of the interests of the consumers and users".

422 Order of 20 January 2004, announced by the Supreme Court (Civil Court, 1st Section) (RJ 2004\54318), FJ 4); Sentence of 31 December 1979, announced by the Supreme Court (Civil Court) (RJ 1979\4499).

We have previously mentioned that Spanish commentators are divided on this matter, as evidenced in the opinion of Gascón Inchaust,i[423] who concludes that it is perfectly possible to obtain exequatur in Spain of a class action judgment because the Anglo-Saxon system more effectively guarantees the procedural rights of the affected party than the Spanish system. Accordingly, for this scholar, the application of exequatur and subsequent enforcement of the foreign class award or judgment would not deprive a consumer or user of his or her rights, and therefore would not be contrary to public policy. Furthermore, to the contrary, this would be tantamount to extending a series of guarantees and rights to the consumer that the Spanish legal system does not provide.

5. Efficacy of the Arbitration Award issued in a Collective Consumer Arbitration Proceeding

Inexplicably, RD 231/2008 remains silent on the effects that the arbitration award in a collective arbitration process may have on third parties that have not taken part in the proceeding. Therefore, there is no other remedy than to turn to the jurisdictional scope (specifically Article 222.3 LEC), where the legislature establishes the scope of *res judicata* for actions protecting the collective and diffuse interests of consumers as the litigating parties to the dispute, their heirs and beneficiaries, as well *as the interests of non-litigating parties, holding rights upon which the parties' capacity to act is established in the provisions of Article 11 of this Law.*

Under this provision, it is unclear how far the scope of *res judicata* extends when a decision is favourable to a claimant and also whether it would be consistent with the legislation to allow for individual members of a class to opt-out from an arbitral decision issued with respect to all of the members of a class.[424]

There is a conflict between the rights of the corporation and the rights of the injured parties: on the one hand, once the arbitration dispute has ended, a corporation must be able to proceed with its commercial activity without fear of suffering continuous claims for the same events, and, on the other hand, the injured parties that were not a party to the collective proceeding should have recourse to protect their rights.

Article 222.3 LEC establishes an exception to the general principle of *res judicata inter partes*, regardless of whether the judgment is favourable or unfavourable. As articulated by González Cano,[425] who laments the absence of a mechanism of

[423] Gascón Inchausti, F; Tutela *Judicial de los Consumidores y Transacciones Colectivas;* Cuadernos Civitas, 2010. Gascón Inchausti, F; Anwar v. Fairfield Greenwich Ltd., 1:09-cv-00118-VM-THK (S.D.N.Y.). [Judicial Protection of Consumers and Collective Transactions]

[424] Ribón Seisdedos, Manual Básico de Arbitraje de Consumo.

[425] González Cano, M. *La Tutela colectiva de consumidores y usuarios en el proceso civil.*[The Collective Protection of Consumers and Users in the Civil Process]

voluntary opt-out, it is not possible for those parties that were not present at the judicial proceedings to file a subsequent lawsuit defending their rights in relation to the same damaging events. This is because the final judgment extends the effects of the award even to parties who were not party to the proceedings.

However, in an arbitration proceeding, there is no equivalent provision as the one found in the LEC, and therefore, it is more difficult to extend the effects of an arbitration award to third parties. Of course, there may still be consumers or users that choose to seek redress in the ordinary courts, and depriving them of this right of judicial access would be contrary to Article 24.1 of the Spanish Constitution.

6. Corporate Arbitration in the Arbitration Act

We must address corporate arbitration or corporate and/or statutory arbitration pursuant to the Spanish Arbitration Act[426]. In this regard, we reemphasize that we are not dealing with an arbitral class action or class arbitration in the literal sense, however, the effects of an award issued in an arbitration of this type may, to a certain extent, be similar to the effects of class arbitration. [427]

The Spanish Arbitration Act sets forth rules for double arbitrability for corporations: 1) for internal corporate disputes and 2) for challenging corporate resolutions. There are some unique aspects of this second category of disputes, such as the fact that only the shareholders or administrators may initiate arbitration, as well as the preclusion of corporate arbitrations before *ad hoc* arbitral tribunals (Art. 11 bis. 3 LA).[428]

Hypothetically, let's assume that a General Shareholders' Meeting has adopted a resolution and that the company's by-laws contain an arbitration clause. In the event that several shareholders wish to challenge a resolution of the General Shareholders' Meeting, they must begin arbitration proceedings before the arbitral institution referred to in the by-laws.

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426 La Regulación del Arbitraje Estatutario, María Jesús Ariza Colmenarejo, in *La Reforma de la Ley de Arbitraje de 2011*, ed. La Ley.

427 If a company has included an arbitration clause in its by-laws, to settle any disputes that may arise within the company, for example in accordance with the institutional rules of the ICC, the consequences would be very similar to those contemplated in the Anglo-Saxon class actions.

428 Art. 11 bis. Corporate Arbitration.
Corporations shall be permitted to submit their internal disputes to arbitration.
The introduction into the corporate statutes of a submission to arbitration clause shall require an affirmative vote of at least two-thirds of the total number of shares held by voting shareholders.
The corporate statutes shall be permitted to allow challenges to corporate resolutions by shareholders or directors through a submission of the dispute to one or more arbitrators, entrusting the administration of the arbitration and the designation of the arbitrators to an arbitral institution.

The arbitration proceeding will end with an award either approving or annulling the resolution adopted in the Shareholders' Meeting. This arbitration award, in accordance with Spanish legislation, should be recorded in the Commercial Registry. As a result of this registration, the arbitral award will effect all shareholders, even those who did not participate in the arbitration proceeding.

The main problem with these arbitrations is the need to expressly submit to arbitration. However, this obstacle is overcome once the company's by-laws are registered, which essentially means that they are accessible to any interested party; in this case, any shareholder or potential shareholder.

Through this registration process and by submitting to what could be referred to as *"class"* corporate arbitration, the result of the dispute resolution may affect a large number of individuals that did not necessarily take part in the arbitration proceeding itself.

7. Conclusion

We can conclude that the reforms initiated by the LEC to integrate certain principles typical of the Anglo-Saxon *class actions,* such as procedural economy, the avoidance of contradictory decisions, the reinforcement of consumer interests by allowing the group as a whole to pay the fees of a single attorney and permitting judicial access for small claims that could not otherwise be made because of expensive costs, have not been fully achieved in consumer arbitration.

Despite the legislatures intent to allow true some collective arbitration actions in consumer matters, RD 231/2008 is not satisfactory. This type of arbitration will result in slower and longer proceedings before the consumer can see its particular case resolved and its interests satisfied. In other words, by making consumer arbitration into a complex and slow process, where the award will only affect those consumers that participate in the consumer arbitration process, the collective arbitration proceeding substantially departs from the pure *class action* device. The current legislation does not even deal with a collective process, but rather it addresses a procedural accumulation of actions (*i.e.*, a sum of individual conflicts).

Accordingly, the collective consumer arbitration becomes a mechanism to argue and decide in a joint manner – namely, in one procedure – a set of individual claims filed by several consumers against the same corporation with an identical *causa petendi*. Only the consumers that participate will benefit from a favourable award.

In conclusion, although RD 231/2008 refers to arbitration and collective interests in similar terms as those found in the LEC, the essential elements of consumer arbitration (*i.e.*, the voluntary nature, efficacy *inter partes* of the consumer arbitration agreement and the *res judicata* effect of the final award) are very different from the protection afforded to those collective interests under the LEC, a system that is not as developed and is very different from consumer arbitration which, in turn, is not as advanced as the Anglo-Saxon styled *class action*.

Class Actions and Arbitration Procedures – Sweden

Hans Bagner, Sara Ribbeklint & Pontus Ewerlöf

1. Overview of the relevant rules

The Arbitration Act (1999:116), which entered into force in June 2000, regulates the basic features surrounding arbitration in Sweden between individual parties. Arbitration is a well-established and commonly used dispute resolution procedure in the Swedish business community. On the other hand, class action arbitration is not recognized in Sweden. Thus, the Arbitration Act does not include any specific provision dealing with class actions. Neither do the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC-Rules").[429] Although the concept of class action arbitration is not part of the Swedish judicial system, the concept may come into play in proceedings for the enforcement of foreign arbitral awards under the New York Convention. We will address this issue at the end of this chapter.

In contrast, the Group Proceedings Act (2002:599) entered into force in January 2003, making Sweden the first country in the world, outside the common law world, to provide for the right to initiate class actions within the court system. The Group Proceedings Act sets out a specific procedure for group related claims, whereby a plaintiff in the proceedings, may represent a group of individuals and/or legal entities, not being parties to the proceedings, against one or several respondents. The court decision in the proceedings will be binding on the group and the group members have the right to appeal. Group actions are intended to supplement conventional legal proceedings and are in general governed by the same procedural rules.

Group actions are unusual in Sweden. By 2011 there have been eleven judgments in such proceedings, mostly in consumer related matters. These cases have been of interest to the media making group proceedings a widely known feature in Sweden, also outside the legal community.

[429] The SCC Rules in force as of 1 January 2010 include a provision on consolidation of new claims into a pending arbitration between the same parties and concerning the same legal relationship. In comparison to the new ICC Rules in force as of 1 January 2012, which deals with joinder of additional parties and consolidation of arbitrations, the scope of consolidation under the SCC Rules is much narrower.

Apart from the possibility to initiate group actions according to the Group Proceedings Act, it is possible for the Consumer Ombudsman or, in some instances an organisation of consumers or employees, to initiate a group action before the National Board to restore the Consumers Disputes (*Sw. Allmänna reklamationsnämnden*). The National Board for Consumers Disputes will render legally non-binding-recommendations on how disputes between consumers and business enterprises which are normally adhered to by the business community.

Non-residents may initiate court proceedings in Sweden on the assumption that the court will find that it has jurisdiction. The court may disallow jurisdiction in cases where there is none or only a minor connection to Sweden, i.e. when there is a lack of interest for a Swedish administration of justice.

2. Brief presentation of the national class action system

2.1. The Group Proceedings Act

The Group Proceedings Act applies to most areas of civil law, however, with the exclusion of labor law and marketing law. Group actions may thus be initiated in case of consumer disputes (purchase of goods and services), actions under the Product Liability Act (1992:18), insurance disputes, patient injury insurance disputes, disputes regarding reimbursement of pharmaceuticals, damages for disasters and major accidents, and disputes regarding discrimination. Furthermore, the Environmental Code contains provisions making it possible to initiate group proceedings.

The Group Proceedings Act entered into force in January 2003. During the preparatory work, the legislator intended to adopt provisions for the general proceedings in the Code of Judicial Proceedings ("CJP") (1942:740) to apply. As a consequence, the provisions in the CJP are applicable to group proceedings.

There are twenty one district courts in Sweden designated to handle group actions.[430] No specialist judges are appointed but in environmental cases the court will consist of environmental experts in addition to the ordinary judges.

2.1.1. The conditions for group actions

A group action can be initiated by (i) an individual or a legal entity comprising a claim covered by the group action, (ii) specifically designated governmental authorities and (iii) non-profit organisations. A group action can also be initiated by the plaintiff in a regular litigation, asking the court to convert the case to a group action.

[430] Förordning (2002:814) om behörighet för tingsrätter att handlägga mål enligt lagen (2002:599) om grupprättegång m.m.

The action will be treated as a group action, if the claims are based upon common circumstances and the court finds that group proceedings are the best option available considering factors such as the group members claims, the group (size and delimitation) and the chosen plaintiff. Hence, the relevant circumstances in relation to all group members' claims must be similar and the basis for the individual claims cannot significantly differ from each other. Moreover, the plaintiff needs to be suitable taking into consideration factors such as its interest in the matter and its financial means. If the court finds that group proceedings are the best option available considering the claims, the group and the plaintiff, a group action shall be permitted.

The Consumer Ombudsman and Swedish Environmental Protection Agency are currently the only governmental authorities designated to initiate group proceedings in Sweden. The Consumer Ombudsman may initiate representative action in consumer disputes of common interest. The Swedish Environmental Protection Agency may initiate action in respect of claims for damages in cases of importance safeguarding general environmental interests.

To be considered as a "non-profit organisation" the organisation is required to protect the interest of consumers or employees in disputes between consumers and undertakings regarding the sale of goods, services or other commodities that the undertakings offers consumers. When initiating such action the same organization can also include other types of claims provided that it involves significant advantages that the claims are dealt with jointly, all circumstances considered. The non-profit organisations do not have to be approved by the state.

When a representative body initiates a group action, the representative body acts as plaintiff and represents the group without taking on the group members' claims. At the present time, in all ruled cases, except two, the claims have been brought by an individual or a legal entity. In the two other cases the claims have been brought by a specifically designated governmental authority (the Consumer Ombudsman)[431] and a non-profit organisation (the Eritrean association in Husby, Solna, Umeå, Gothenburg and the Eritrean women association in Solna).[432]

Examples from the Swedish courts when group actions have been permitted are where the claims are based on cancelled flights and no compensation is given to the travelers (*Bo Åberg ./. Elefterios Kefalas*)[433], where an energy company has charged its customers with unreasonable fees based on its general terms and conditions (*Konsumentombudsmannen ./. Kraftkommission i Sverige AB*, nowadays Stävrullen

431 Umeå District Court, case No T 5416-04.
432 Uppsala District Court, case No T 1850-11.
433 Stockholm District Court, case No T 3515-03. The case was later moved to Nacka District Court after reorganization, case No T 1281-004.

Finans AB)[434] and where female students have addressed claims against a university for discrimination in the admission process (*Elin Sahlin ./. Lunds universitet*).[435]

2.1.2 Court proceedings

The Group Proceedings Act sets out a specific procedure for handling a group of related claims. A plaintiff, who is a party to the proceedings, represents a group of individuals and/or legal entities, who are not parties to the proceedings, against one or several defendants. There are no statutes for defining a group and there are no minimum numbers of claims that can be managed under the procedure. Instead the court decides whether a group action is appropriate.

An important principle in the Swedish civil procedure is that the party himself can decide whether or not to hire a counselor and that anyone who uses a counsel can choose who gets the assignment. However, when it comes to group proceedings, the Group Proceedings Act contains an exception. In order to be allowed to represent a group in group proceedings, counsel must be a member of the Swedish Bar Association, the main reason being to protect the interest of the group members.

Where a court action is initiated by the plaintiff all potential group members are to be identified by name and address in the application for summons, or in some other way (e.g. all subscribers to a newspaper). The potential group members shall be notified of the proceedings individually or through a public announcement or advertisement in a newspaper. Advertisement is always permitted, but not required. Potential group members are normally notified by the court. However, to the extent that it brings significant advantages to the court procedure; the court may order a party to notify the potential group. The procedure is "opt-in", i.e. only the group members that reports to the court within a certain time that they wish to take part in the proceedings, are induced by the continuation of the lawsuit and will be bound by the judgment. The court can impose a "cut-off" date by which the group members must join the litigation at the latest.

All remedies available in civil disputes are available in group actions: monetary compensation; specific performance; declaratory relief and injunctive relief. Injunctive relief can be combined with a penalty. The damages that are recoverable are bodily injury, mental damage, damage to property and economic loss. However, economic loss resulting without connection to any other type of damage and occurring outside any contractual relation is as a main rule only recoverable if incurred as a result of a crime. Injury must incur for damages to be recoverable. Punitive damages are in general not available in Sweden. The claimant presents individual

[434] Umeå District Court, case No T 5416-04.
[435] Malmö District Court, case No T 9330-09.

claims for each group member, which means that claims for damages may differ between members.

The courts do not commonly select "test" or "model" cases and try all issues of law and fact in those cases; neither do the courts determine generic or preliminary issues of law and fact. Common to all "test" or "model" cases in Sweden is that the adjudication of the judgment and the possibility to execute the same is limited to the parties and therefore do not apply to the other group members.

In general the court tries the whole group action, including all issues of law and facts, at the same time. When appropriate, however, the court may issue a judgment on a preliminary issue of law or fact being relevant for the entire group or part thereof. There is no specific case management procedures typically used in the context of class/group litigation.

Since the group members are not parties to the proceedings, they do not have an obligation to appear during the trial.

The procedure provides for the management of claims by means of a group action where related claims are managed together, but the court's decision in one case will not automatically create a precedent for the other claims within the group. The court therefore gives one specific judgment in relation to each group members' claim. Pursuant to Chapter 35, Section 5 of the CJP, the court may decide damages at a reasonable amount for each group member if it is difficult to assess the damages.

Normally the case will be heard and decided by three judges. The court may however, decide that the bench shall consist of only one judge if the parties consent thereto or the case is simple.

2.1.3. Evidence

There are generally no restrictions on the nature or extent of the evidence. Evidence can in exceptional cases be dismissed by the court if it is deemed to be clearly irrelevant.

The parties may present expert witnesses. When deemed necessary the court may appoint an independent expert to give an opinion on the dispute. However, the parties are responsible for presenting evidence and normally the parties, and not the court, will introduce expert witnesses. An expert report shall be submitted for each expert witness presented to the court. Fact or expert witnesses are not required to be available for pre-trial deposition. No written witness statements are submitted by the witnesses of facts. Instead the parties will be required to detail, in a submission, the theme(s), of evidence of their witnesses.

There is no obligation to disclose documentary evidence before the court proceedings. At the request of a party the court can, however, order the other party or a third party to produce documents. Such request can only be granted if it concerns an identified document or set of documents that can be assumed to be of evidentiary significance to the case. Further, there are strict limitations on the obligations to provide documents containing trade secrets or legally privileged information.

2.1.4. Funding and costs

In contrast to ordinary civil proceedings in Sweden, funding of group actions is allowed through conditional or contingency fees. Conditional or contingency fee agreements between the plaintiff and its counsel are only valid and enforceable in relation to the members of the group if approved by the court. The agreement should be concluded in writing and indicating the way the fees are intended to deviate from normal fees if the claim where to be completely granted or rejected. The agreement may not be approved if the fees are based solely on the value of the claim. Third party funding of claims are considered to be entirely a contractual matter and would be permitted as such. In addition, it should be noted that public funding is available in the form of legal aid up to 100 hours, which is generally available for individuals with limited resources who do not have and could not be expected to have legal coverage through an insurance (considering the individual's financial recourses).

The successful party can recover court fees and other expenses, as well as its own legal costs for initiating the proceedings, to be paid by the losing party. In general, the cost follow the event rule applies in Sweden. It is the court that renders cost orders. Litigation costs are only recoverable to the extent that the court finds these reasonable to safeguard the partys' interest. If a partys' claim is only partly granted, the court may decide that the losing party should only pay part of the winning party's reasonable costs, or that each party shall bear its own costs.

Generally, the plaintiff, and not the group members, is liable for the litigation costs as a consequence of the group members not being parties to the proceedings. An individual group member is however liable for any costs caused by its negligence, or costs caused because the members' claim has been brought without reason. Further, if the claim is successful and the defendant has been ordered to compensate the plaintiff for litigation costs and the defendant is unable to pay any costs ordered, the group members are liable for such costs. Group members are also liable to pay costs in connection with conditional or contingency fee agreements that the defendant has not been ordered to pay. However, each member of the group is only liable for its share of the costs in relation to its share of the claim and is not liable to pay more than what the members has gained through the proceedings.

An individual member can discontinue its claim before the "cut-off" date without any cost consequences. After that point in time, the member cannot discontinue its claim unless the member intervenes and becomes a plaintiff, in which case the member will become liable for costs according to the general rules stated above.

When the Consumer Ombudsman or the Swedish Environmental Protection Agency initiates group proceedings, the government covers the legal expenses.

2.1.5. Appeal options

District court rulings may be appealed to the relevant court of appeal. Leave to appeal is required before a court of appeal will try a district court judgment. Leave to appeal should be granted if (i) there are reasons to question the correctness of the district court judgment, (ii) it is necessary for the court of appeal to try the case in order to be able to evaluate the correctness of the district court judgment, (iii) it is of importance for the guidance of the application of law that an appellate court tries the case; or (iv) there are any extraordinary reasons to try the appeal. The court of appeal is the highest level for the majority of the cases. The Supream Court will only grant leave to appeal if a question in the case is of importance for the guidance of the application of the law, or if there have been major procedural errors in the lower courts.

In group actions, any member of the group may appeal on behalf of the group and will then enter into the proceedings as plaintiff. A member of the group can also appeal the ruling only as far as it concerns the individual member´s right. The case will then not be handled as a group action in the court of appeal.

2.1.6. Recent Developments

In 2008 there was an evaluation of the Group Proceedings Act.[436] However, the Swedish government has not proposed any changes in the Group Proceedings Act. Most likely the Swedish government will await the outcome of the public consultation from the European Commission concerning whether class actions may or may not be a suitable subject for EU legislation before any changes are proposed.

3. Class actions and arbitration

3.1. Restrictions on the possibility to conduct class action arbitration

Under Swedish law, an arbitration agreement is an individual agreement between two or more parties. Hence, the notion that numerous potential claimants may commence arbitral proceedings based on indentical arbitration agreements set

[436] Ds 2008:74, Utvärdering av lagen om grupprättegång.

forth in e.g. a standard form contract against a respondent is not accepted under Swedish law. Although the arbitration agreements have the same wording, they are seen as individual agreements between each of the protential claimants, on the one hand, and the respondent, on the other hand. Consequently, since the Arbitration Act and the SCC Rules are silent with respect to class action arbitrations, there is no way for a group of potential claimants to unilaterally join their claims into one single arbitration.

In addition, if one compares the Swedish interpretation of arbitration clauses with the US approach, it is quite different. In the US the courts tend to strictly hold on to the arbitration clause itself. Most of the US courts seem to uphold arbitration agreements, even if the arbitration clause is in small print and incorporated in hidden locations in standard form contracts, employee handbooks or related documents, flyers included in the post with bills or other statements, packaging that arrives with a computer etc. In Sweden, on the other hand, the courts are more likely to dismiss an arbitration clause in similar situations or if one of the parties is considered weaker than the other, for example in employment- or consumer-related disputes.

In the 1980's the Swedish Supreme Court stated that arbitration clauses shall be dismissed as being unfair in several cases between a business enterprise and an individual because of the unequal strength of the parties. The majority of cases in the Supreme Court in relation to this issue have been disputes between consumers and builder and contractor companies.[437] The Supreme Court's judgments have been based on the idea that everyone shall have "access to justice". The costs of arbitration can be a heavy burden on the consumer, who normally is the financially weaker party, and the consumer may choose not to initiate proceedings rather than take the risk of incurring substantial legal costs.

Furthermore, the new Arbitration Act which entered into force in 2000 stipulates that in the case of a dispute between a business enterprise and a consumer, an arbitration agreement concluded before the dispute arose is invalid. The Act of Judicial Proceedings in labor disputes (1974:371) contains similar provisions, namely that in disputes involving sex discrimination, right of assembly or ethnic discrimination an arbitration agreement entered into before the dispute arose is invalid. Neither can disputes regarding the validity of collective agreements, or exemptions from such an agreement be settled by arbitrators.

Even if the concept of class action arbitrations were to be recognized under Swedish law, which it is not, the aforementioned explicit exemptions from the general notion that arbitration agreement should be upheld and enforced concerning consumers

[437] *See* for example; Judgment June 12, 1981, Supreme Court, case No Ö 1106/79 (NJA 1981 p. 711) and Judgment June 28, 1983, Supreme Court, case No Ö 375/82 (NJA 1983 p. 510).

and employees would be an effective limitation of the scope of potential class action arbitrations anyway.

3.2. Enforcement of foreign class action arbitral awards

Sweden ratified the New York Convention on 28 January 1972 without either the "reciprocity" reservation or the "commercial nature" reservation available to the signatories. Accordingly, all foreign arbitral awards are enforceable in Sweden, irrespective of where they are rendered and whether or not they are of commercial nature. Taking a pro-arbitration view, the Swedish Supreme Court has always stressed the importance of respecting the object and purpose of the New York Convention. Accordingly, it is safe to assume that parties relying on Article V of the New York Convention for the recognition and enforcement of an arbitral award in Sweden can expect the courts to apply forseeable and internationally established principles on procedural due process, arbitrability and public policy.

Grounds for refusing the recognition and enforcement of foreign arbitral awards are stipulated in Section 54 of the Arbitration Act. These provisions correspond to Article V.1 of the New York Convention. There are additional grounds for refusal stipulated in Section 55 of the Arbitration Act concerning the case where the arbitral award includes the determination of an issue which, in accordance with Swedish law, may not be decided by arbitrators (i.e. the issue is non-arbitrable), or that the recognition and enforcement of the award would be clearly incompatible with the basic principles of the Swedish legal system (i.e. in violation of public policy). Section 55 of the Arbitration Act corresponds to Article V.2 of the New York Convention. The grounds for refusal contained in Section 55 shall be considered by the court *sua sponte*.

In case a party would seek to have a class action arbitral award recognized and enforced in a Swedish court, there are mainly two grounds for refusal that would be relevant for the court to adjudicate. First, it may be argued that the class action arbitration would be a violation of due process. If the party, against whom the award is invoked, was not given proper notice of the appointment of the arbitrator(s), or of the arbitration proceedings, or was otherwise unable to present his case, the award shall not be recognized and enforced. Although there may be class action arbitrations where members of the group acting as claimant may argue that they have not been duly notified of the arbitral proceedings or that they have otherwise been unable to present their case, in particular in cases where an opt-out principle applies, such situation would normally have no bearing on the party against whom the award is invoked. The due process defence against the recognition and enforcement of a class action arbitral award would thus be futile.

Secondly, it may be argued that the class action arbitration would be in violation of public policy. In theory, it may be argued that class action arbitrations, in particular

concerning the relationship between an enterprise, on the one hand, and a consumer or an employee, on the other hand, where, under Swedish law, arbitration agreements may not be upheld, would be in violation of Swedish public policy. However, also in such cases, the defence is relevant for the member of the group of claimants rather than for the party against whom the award is invoked. In addition, the public policy defence would come into play only in offensive cases.

Accordingly, in light of the arbitration-friendly approach taken by the Swedish courts, a class action arbitration award which would be enforceable at the seat of the arbitral proceedings would most likely be recognized and enforced also in Sweden, in particular since the notion of class action litigation is well-known to Swedish courts from the Group Proceedings Act. This being said, the issue has not yet been adjudicated by the courts.

3.3. Individual action vs. class action

3.3.1 Individual arbitration vs. class litigation

Individual arbitration has several advantages compared to class litigation. Arbitration is faster, it is private, it is flexible and the parties have more influence over the proceedings. This applies in particular to the seat of arbitration, applicable law and appointment of arbitrators.

If there is an arbitration agreement between the parties, it will serve as a bar to court proceedings if invoked by a party. In such cases the class action in court should be dismissed. The proceedings in class litigation are public. The experience from the few cases that have been brought before the courts in Sweden is that the proceedings are time consuming. In the above mentioned case *Konsumentombudsmannen vs Kraftkommission i Sverige AB*, it took almost three years from the initiation of the proceedings until a final decision regarding the defendant's plea for the dismissal of the case due to procedural issueswas rendered. The defendant argued that the particular procedural requirements for a class action where not fulfilled, and that the court therefore should dismiss the case. The defendant's objection was dismissed by the District Court and by the Court of Appeal. The Supreme Court did not grant a leave to appeal. The aforementioned case between *Bo Åberg vs Elefterios Kefalas* was settled after four years of litigation.

3.3.2. Individual arbitration vs. class settlement

Individual arbitration has the advantages mentioned in section 3.3.1 above.

Very few class actions proceed to a main hearing, and even fewer are determined by a judgment on the merits. This is one of the explanations to the few cases reported in Sweden. Normally the parties reach a settlement before or during the

proceedings. According to the Group Proceedings Act a settlement can be reached between the defendant and one or more group members, so-called individual settlements, and/or between the defendant and the representative body, so-called group settlement. A settlement concluded by the plaintiff on behalf of the group is valid only if confirmed by the court. The court shall confirm the settlement unless it is discriminatory against particular members of the group or in any other way is manifestly unfair. Individual members of the group can always settle their claims without court approval.

3.3.3. Individual litigation vs. class settlement

Individual litigation is always an option to consider instead of class litigation given the circumstances of the case. The proceeding will then follow the statutes of the CJP and will be conducted in public. The length of the proceedings depends on the nature of the case, and on the workload of the court handling the dispute. In court proceedings the court is, however, under an obligation to explore the possibilities to settle the dispute amicably.

If a class settlement is reached by the claimant on behalf of the group, it is only valid if confirmed by the court. The court shall confirm the settlement unless it is discriminatory against particular members of the group or in another way is manifestly unfair.

3.3.4. Individual settlement vs. class treatment

Individual members of the group can always settle their claims without court approval.

3.3.5. Individual litigation vs. class action arbitration

As previously mentioned, the Arbitration Act and the SCC Rules do not provide for class action arbitration (see section 1.1 above).

4. Conclusion

Since the Arbitration Act and the SCC Rules do not provide for class action arbitration and there are certain restrictions on the validity of arbitration agreements between enterprises and consumers/employees, class action arbitration is an unknown feature of the Swedish arbitration system. In addition, under Swedish law, the arbitration agreement is seen as an individual agreement between two or more parties, leaving no room for class action or collective arbitrations. However, Sweden is long known to be an arbitration-friendly country. By adopting the pro-arbitration approach of the Swedish Supreme Court, a foreign class action arbitral

award might be recognized and enforced by the Swedish courts in line with the underlying principles of the New York Convention.

The Arbitration Act of 1999 is currently subject to review by the Ministry of Justice, seeking to meet criticism that has emerged since the Arbitration Act came into force. We have received information from the Ministry that there are no changes contemplated which would have any impact on class action arbitrations.

Class Action and Arbitration Procedures – United Kingdom

Ian Hunter QC & Louis Flannery

1. Introduction

Strength in numbers. This is of course the keystone on which the trade union movement was constructed and still functions today. It is also a critical element in various different forms of collective redress in the field of litigation.

The most obvious example of collective redress is the class action as practised in the United States. Those who advocate the existence of class actions argue that they are the sole means by which individuals and certain businesses may remedy certain types of unlawful conduct which results in a relatively small loss on an individual basis, but in large damages when aggregated together.

In recent years, in particular since the decision of the United States Supreme Court in *Green Tree Financial Corp v. Bazzle*[438] in 2002, class action arbitrations have begun to occur with increasing frequency. It is this development in the US that has prompted the decision to investigate the extent to which a similar development might (or ought to) occur within the EU, or indeed (in relation to some Member States) may already have occurred. Other examples of collective redress include what in English law and practice are referred to as representative actions and group litigation.

What we propose to do in the present chapter is first of all to examine in broad outline the salient features of class actions in the United States court system. The principal reason for doing so is because the rules governing class arbitrations, as formulated by the American Arbitration Association (AAA) and by the Judicial Arbitration and Mediation Services Inc. (JAMS), both of which were introduced following the *Bazzle* case, closely follow those that apply to federal class actions in the US courts.[439] We then go on to consider whether class action arbitrations are feasible in the UK and, if not, what obstacles lie in the way.

438 539 U.S.444, 123 S.Ct.2402 (2003).
439 *See* further on this section 3 below.

In that connection, we examine the compatibility of class action arbitration with the provisions of the Arbitration Act 1996, and the rules of arbitral institutions such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA). We will then look at the areas of litigation where class actions are prevalent in the United States to see how English law might respond to the challenges there raised. We consider in particular the areas of consumer protection, anti-trust enforcement and employment law. We also consider other forms of collective redress such as representative actions and group litigation.

So far as English law is concerned, we then examine enforcement issues, both as regards class action arbitrations where the seat of the arbitration is outside England and Wales and in relation to other forms of collective redress.

We will also review the position under Scots law,[440] before considering the future position, taking into account recent developments in England and the EU with regard to the issue of collective redress generally in the consumer sphere.

The relevant features of US class actions

Class actions have formed part of the US federal legal system since 1938. In their current form they date back to 1966. They are governed by Rule 23 of the Federal Rules of Civil Procedure ("FRCP"). This sets up a procedure under which in certain circumstances one or more members of a class may sue or be sued as representative parties on behalf of all members of that class.

Rule 23(a) of the FRCP sets out four "prerequisites" for bringing a class action. They are:

- numerosity – the class is so numerous that joinder of all members is impracticable;
- commonality – there are questions of law or fact common to the class;
- typicality – the claims or defences of the representative parties are typical of the claims or defences of the class; and
- adequacy of representation – the representative parties will fairly and adequately protect the interests of the class.

[440] The Arbitration Act 1996 applies *in its entirety* to England and Wales (as one jurisdictional unit), as well as Northern Ireland. It also applies *in part* (but only as to consumer arbitrations) to Scotland, which is another jurisdictional unit (England, Wales, Scotland and Northern Ireland together being known as the United Kingdom, which is a political unit made up of three different legal jurisdictions). Scotland now has its own separate legislation concerning arbitration (the Arbitration Act 2010). See section 7 below.

If all the four prerequisites are met, the Court may still refuse to allow a class action to be maintained unless it is satisfied either: (1) that permitting the class action would avoid the risk of (a) inconsistent or varying adjudications by or against individual class members or (b) adjudications with respect to individual members being, as a practical matter, dispositive of the interests of other members not party to the individual adjudications; or (2) that the potential defendant has acted or refused to act on grounds that apply generally to the class, so that injunctive or declaratory relief is appropriate in respect of the whole class; or (3) that the questions of law or fact common to class members predominate over any questions affecting only individual members, so that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy (see generally Rule 23(b)).

In the US, class actions are almost always certified under category (3) above, which entails the notice provisions discussed in the following paragraphs.

Class action notice is required to be given to all persons who would be affected by the court's decision. Although it is usually impossible to give every such individual personal notice, all persons who might be affected are entitled to the best notice possible. The court will order the class representative, through his or her attorneys, to make reasonable attempts to notify any unknown class members by general media such as television, an advertisement in a magazine or newspaper, or a posted flyer. People who receive notice of the class action then have the opportunity to join in the action – called "opt in" – or to decide not to participate as a member of the class – that is, to "opt out." In some cases, individuals do not have the opportunity to opt out. For example, if a class action has been filed over particular injuries caused by a particular defendant, all people who are similarly situated are automatically in the class and must live with the outcome. Otherwise, the general rule is that unless a class member positively decides to opt out, they are deemed to be included in the class action, and therefore entitled to share in the fruits of any judgment but also obliged to be bound by the result.

For any class certified as a class action under Rule 23(b)(1) or (2) above, the court may direct "appropriate notice" to the class. This is not defined in Rule 23 for those two categories. For some reason, the formal notice provisions of Rule 23 FRCP requiring notice apply only to Rule 23(b)(3) class members, and such notice must be "the best notice practical under the circumstances." Nevertheless, courts have held that due process requires adequate notice to members of all class actions, including those brought under Rule 23(b)(1) or (2).

For any class certified under Rule 23(b)(3), the representative must direct to class members (and be responsible for the cost of) the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

- the nature of the action;
- the definition of the class certified;
- the class claims, issues, or defences;
- that a class member may enter an appearance through an attorney if the member so desires;
- that the court will exclude from the class any member who requests exclusion;
- the time and manner for requesting exclusion; and
- the binding effect of a class judgment on members.

As far back as 1950, the Supreme Court in *Mullane v. Central Hanover Bank & Trust Co*[441] articulated the standard for notice of a pending class action that would satisfy due process. The Court required individual notice by mail for those persons whose names and addresses were known or could be determined with reasonable effort. However, where notice to other individuals would be impractical – e.g. where the identities of class members are unknowable or where the cost of ascertaining the names and addresses of parties would be considerable – the Court approved of constructive notice by publication.

The reason for examining in greater detail the indicia of federal class actions is that these prerequisites and ground rules for the certification and notification of a class action have been largely reproduced, as we will see shortly, by the AAA and JAMS in their Class Arbitration Rules. So it is relevant to examine the procedural consequences of the certification of a class.

It is important to note that the requirements of numerosity involve a conclusion by the Court that joinder of all members of the class is impracticable. The obvious corollary of that is, although under Rule 23(c)(2)(b) the Court must direct to class members "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort", the fact is that there are likely to be members of the class, sometimes a substantial number, who are wholly unaware that they enjoy or (where relevant) suffer from class membership. Problems then arise because once a class has been certified, all members of the class are deemed to have suffered the same type of injury as the class representative and the whole class can and (if appropriate) will be compensated if liability is established. The class extends to all members of the certified class whether or not they have received notice or are aware of the fact that they are members.

As discussed above, the FRCP provide an "opt-out" procedure. It is only if a class member takes the positive step of electing to remove himself from the class that he is not bound by any judgment in, or settlement of, the class action, and that is the case whether or not he has actual notice of the class.

441 (1950) 339 US 306.

There are obviously many advantages to litigants in class actions, particularly to claimants. This is particularly the case where a large number of claimants have suffered similar injury and where the loss in individual terms is small and probably would not justify legal proceedings, but where the aggregate loss is very large and certainly worth pursuing. The availability of legal representation by way of contingency fee arrangements and the vagaries of jury trial in the United States have given class actions a bad press outside that country. From a defendant's point of view there is the advantage that once judgment has been rendered it knows it has no other exposure in relation to the same injury (except perhaps at the hands of those class members who chose to opt out).

On the other hand, the fact of the strength of numbers in a certified class coupled with an aggressive and well-remunerated plaintiff bar working on a contingency fee basis and the uncertainties of the trial system often mean that defendants in class actions decide to settle, even where the claims against them are unmeritorious.

2. Class action arbitrations

In a nutshell, the above is a simplified analysis of the US federal class action procedure in litigation. As we said earlier, in recent years – and increasingly since 2002, when the Supreme Court decided the *Bazzle* case (see the following paragraphs) – class action arbitrations have started to happen and the pace at which this has been happening in the States has been quickening.

As at 2009 nearly 300 class action arbitrations had been commenced using the AAA class arbitration rules and the latest statistics indicate that 358 cases have been filed to date.[442]

In *Bazzle*, the Supreme Court was concerned with an appeal from a decision of the Supreme Court of Carolina involving two separate class actions (subsequently consolidated) against the same lender, Green Tree Financial Corp. In the first (led by the Bazzles), individual borrowers each entered into separate financing agreements in similar boilerplate terms with Green Tree for home improvement loans.

The second set of actions (led by the Lackeys) involved customers who had been lent money by Green Tree for the purchase of mobile homes. In each case the loan and security agreements provided that claims relating to "this contract…will be resolved by binding arbitration by an arbitrator selected by us with the consent of you". There were said to be several thousand claimants in each group.

At the time of all the loan transactions, Green Tree apparently failed to provide their customers with a form that would have told them that they had a right to name and

[442] As at 1 June 2012.

seek advice from their own lawyers and insurance agents and would have provided space for them to write in those names. This was a requirement of South Carolina state consumer law. Each set of claimants therefore filed a class action lawsuit alleging that the lender had not complied with these legislative requirements.

Green Tree applied to stay the two cases and for an order that two separate arbitrations take place. The state court denied the motion and mandated class actions by way of arbitration. The two cases were consolidated when the case came before the Supreme Court of Carolina. That Court noted that the law of South Carolina permitted the consolidation of arbitrations without the express consent of the parties (a very different position incidentally from that which prevails under the Arbitration Act.)[443]

The Court then construed the arbitration clause and concluded that it was silent on the issue as to whether class arbitration was contemplated. The Court held that the clause was thus ambiguous. Construing it against the draftsman (it was lender's boiler-plate, remember) the Court held that a class arbitration was permitted. That was the issue before the Supreme Court: "whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions". In the event, the arbitrator awarded substantial damages of approximately $10 million to each set of claimants.

It is not proposed to analyse in depth the various judgments given by the US Supreme Court. In short, there was no majority opinion as such because the justices expressed differing views. The Chief Justice (joined by two others) wrote a dissent based essentially on the wording of the arbitration clause. He pointed out that the arbitration agreement and other provisions in the loan agreement were expressed in the singular, the consequence of which was, as he put it, that "petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and the specific buyer…[T]he imposition of class-wide arbitration contravenes the just-quoted provision about the selection of an arbitrator".

The principal opinion was written by Justice Breyer and he was joined by three others. His judgment is somewhat nuanced.[444] He took the view that the issue as to whether the agreement forbade class arbitration was not one for the Supreme Court of Carolina but rather one for the arbitrator to determine. Justice Breyer observed that the parties had definitely agreed that the dispute between them should be resolved by arbitration; the real issue for him was what kind of arbitration that should be. Justice Stevens wrote a separate opinion concurring in the result but dissenting in part. He ended by stating that, were he to adhere to his preferred disposition of the case, there would have been no controlling judgment by the Court, so that in

443 *See* section 35(2) of the 1996 Act.
444 *Loc. cit* at pages 450-453.

order to avoid that result and because Justice Breyer's opinion expressed a view of the case closest to his own, he concurred in the Breyer judgment.[445]

Although it is far from easy to discern the precise ratio decidendi, the majority judgments have been taken to represent US Supreme Court approval of class arbitration. Since then the AAA and JAMS together have administered several hundred class action arbitrations (their rules are discussed more fully in section 4 below).

It is important to know that the development of the class arbitration procedures has occurred in those states in the United States where the courts are permitted to order consolidation of arbitration. The *Bazzle* case was such a case. The law in South Carolina permitted the court to consolidate arbitrations and that is how the claims of the Bazzles (and their fellow homeowners) on the one hand and the Lackeys (and their fellow mobile-homeowners) on the other each came to be consolidated (albeit) in two separate class arbitrations.

Another state where the court is empowered to order consolidation of separate arbitrations is California. Under the Californian Arbitration Act (CAA), going back as far as 1978, the court may order consolidation where: (i) separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party; (ii) the dispute arises out of the same transaction or series of transactions; and (iii) there is a common issue of law or fact giving rise to the risk of inconsistent rulings by more than one panel.

A very interesting analysis of class arbitration under the CAA written by Richard Chernick (Managing Director of JAMS' Arbitration Practice) is to be found in "Multiple Party Actions in International Arbitration."[446] In the case of *Keating v Superior Court*[447] decided in 1982 (a case involving franchise agreements with convenience stores), the California State Court concluded that its power to consolidate separate arbitrations under the CAA provided the basis for authorising class-wide arbitrations where the various claims meet the standards set out above. As Chernick puts it:

> *"Working from a consolidation model, Keating set a road map for the conduct of a class-wide arbitration".*

A contrast can be seen between those US states in which state law permits the Court to consolidate arbitrations, and the Federal Arbitration Act (FAA), which does not permit arbitrations to be consolidated in the absence of agreement of the parties.

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445 *Loc.cit* at page 455. Justice Thomas wrote a dissent based on his somewhat idiosyncratic view as to the application of the Federal Arbitration Act to state court proceedings.

446 Published by Oxford University Press for the Permanent Court of Arbitration 2008.

447 31 Cal.3d 584 (1982).

There were two systemic reactions to the decision in *Bazzle*. The first, which pulled *towards* class arbitrations, was – as indicated above – that the two major US arbitral institutions (the AAA and JAMS) introduced rules for class-action arbitrations. The second, which pulled *away* from class arbitrations, was that many larger and more sophisticated suppliers of goods and services began to introduce class-action waiver clauses into their contracts. One such class-action waiver provision was introduced by AT&T, the well-known US telephony services provider. The provision introduced into their contract provided in effect for arbitration of any disputes between a customer and the company, but required that claims be brought in the customer's "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding".

In *AT&T Mobility v Concepcion*,[448] this attempt to restrict the application of class arbitrations was challenged on the grounds that it offended the principle set out in section 2 of the FAA that upholds the validity of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract". In the *AT&T* case, the US Supreme Court was in effect asked to define the limits of *Bazzle*, and to decide in effect whether AT&T's clause, which had been upheld by the Californian courts, offended against the FAA principle just quoted. An earlier decision of the California Supreme Court – *Discover Bank v. Superior Court*[449] – had held that most arbitration agreements in the consumer context waiving the right to bring a class action were unconscionable contracts under California law.

The matter finally came before the US Supreme Court in 2011. In a narrow 5-4 majority decision given by Justice Scalia (there was a strong dissenting opinion from Justice Breyer), the Court upheld the validity of class action waivers under Californian law.

The decision in *AT&T* may yet turn out to be the low watermark of class action arbitrations in the US (or *Bazzle* the high watermark). Given the slim majority and eloquent yet fierce dissent in both cases, it remains to be seen whether other attempts will be made to circumvent class action waiver clauses. For the time being, however, the view seems to be that they are valid and enforceable. Notwithstanding this, there will be many less sophisticated companies who will not have excluded class action arbitrations in their contracts, and therefore the overwhelming likelihood is that class action arbitrations in the USA are far from a thing of the past.

448 563 U.S. (2011).
449 36 Cal. 4th 148, 113 P. 3d 1100 (2005).

2.1. Class action arbitration rules introduced by the AAA and JAMS

AAA Supplementary Rules for Class Arbitrations

The consequence of the *Bazzle* decision in 2002 was that the AAA adopted a "Policy on Class Arbitrations",[450] followed in October 2003 by the introduction of its "Supplementary Rules for Class Arbitrations".[451]In its Policy document, the AAA announced that it would administer demands for class arbitrations pursuant to its Supplementary Rules subject to two pre-conditions. The first is that the underlying agreement specifies that disputes arising out of that agreement shall be resolved by arbitration in accordance with any of the AAA's rules and the second is that the agreement is silent with respect to class claims, consolidation or joinder. The AAA stated in the Policy document that it would not accept administration of class arbitration where the underlying agreement prohibited class action, consolidation or joinder unless there was a court order directing the parties to the underlying dispute to submit any aspect of their dispute involving class actions, consolidation or joinder to an arbitrator or to the AAA.

The AAA Supplementary Rules provide for three distinct stages in the administration of class arbitrations. It should be mentioned at the outset that the AAA maintains a national roster of class arbitration arbitrators and at least one of the arbitrators must be appointed from that roster.[452] The first stage is governed by Rule 3 and involves construction of the arbitration clause. The first thing the arbitrator has to do on appointment is to determine as a "threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the 'Clause Construction Award')". Having issued such an award the arbitrator is then obliged to stay the proceedings for at least 30 days to allow any party to apply to the court to confirm or vacate the Clause Construction Award.

If the arbitrator concludes that the arbitration clause does permit class arbitration and there is no challenge to that award or, if challenged the award is upheld, he then proceeds to the next stage: class certification. Rule 4(a) sets out six so-called pre-requisites to a class arbitration and, if each of those is satisfied, the arbitrator should proceed to Rule 4(b), which requires him to reconsider whether class arbitration is maintainable.

The six pre-requisites are closely modelled on the FRCP provisions, including the four pre-requisites already mentioned in paragraph 2.2: numerosity, commonality, typicality and adequacy of protection. Linked with the last is a fifth pre-requisite: that

450 www.foreclosuremediationfl.adr.org/sp.asp?id=28779
451 www.adr.org.
452 AAA Supplementary Rules, Rule 2.

counsel selected to represent the class will fairly and adequately protect the interests of the class. The final pre-requisite, not to be found in Rule 23 of the FRCP, is that each class member must have entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative or representatives and each of the other class members.

If the tribunal is satisfied that each of these pre-requisites is met it will then proceed to determine whether a class arbitration is maintainable pursuant to clause 4(b). The two issues to be considered here are predominance and superiority. Predominance requires the tribunal to find that the questions of law or fact common to members of the class predominate over any questions affecting only individual members. Superiority means that the arbitrator must conclude that class arbitration is superior to other available methods for the fair and efficient resolution of the dispute. Rule 4(b) sets out matters pertinent to determining the answer to these two issues. They include such matters as the desirability or otherwise of having the determination of the claims conducted in a single arbitral forum and the difficulty likely to be encountered in the management of a class arbitration.

Once the tribunal is satisfied that the pre-requisites are met and that a class arbitration is properly maintainable, it will set out its conclusions in a "Class Determination Award" which is required to address each of the matters set out in Rule 4.[453] An award of this kind certifying a class arbitration is required under Rule 5(b) to define the class, identify the class representatives and set out the class claims, issues or defences.

The Class Determination Award must state when and how members of the class may be excluded and, in exceptional circumstances, whether it is inappropriate to allow class members to request exclusion. Attached to that Award must be a Notice of Class Determination, which directs that class members have to be provided with the best notice practicable under the circumstances. Rule 6(a) provides that the Notice of Class Determination must be given to all members "who can be identified through reasonable effort." Before the Notice of Class Determination Award is issued, the tribunal is required by Rule 5(c) to stay all proceedings for at least 30 days to permit any party to apply to the court to confirm or vacate the Class Determination Award. Assuming that there is no challenge (or that any challenge is not upheld by the court), the tribunal may then proceed to issue a Notice of Class Determination.

The Notice of Class Determination is required to state "concisely and clearly...in plain, easily understood language", such matters as the nature of the action, the definition of the class certified, the class claims, issues or defences, the fact that the arbitrator will exclude from the class any member who requests exclusion, spelling out how that election is to be made, the binding effect of a class judgment

453 *Ibid.*, Rule 5(a).

on class members and how the member can obtain information about the progress of the arbitration.

We referred earlier to a three-stage process. The third and final stage is the Final Award on the merits. Rule 7 of the AAA Supplementary Rules provides that the Final Award on the merits is to be reasoned and must also define the class with specificity. Rules 8, 9 and 10 reflect the necessarily public aspects of this arbitral procedure and they are of particular relevance when we come to consider whether class arbitrations exist in English and Scots law and whether procedures similar to those contained in the AAA's Supplementary Rules and similar rules like those in the JAMS Class Action Procedures are compatible with English and Scots arbitration law and, in particular the Arbitration Act 1996.

Rule 10(a) of the AAA Rules provides that any award under the Supplementary Rules must be in writing, signed by the arbitrator or a majority of the arbitrators and provide reasons for the award. It should not be assumed by those unfamiliar with U.S. arbitral practice that all awards in the States are reasoned as a matter of course. In insurance and reinsurance arbitrations governed by ARIAS US rules and practice, for example, it is still unusual for final awards to be reasoned, unless both parties have requested that to happen, and that is itself quite rare. But in class arbitrations under the Supplementary Rules, the tribunal is obliged to provide reasons.

Then, importantly, Rule 10(b) provides as follows:

> *"All awards rendered under these Supplementary Rules shall be publicly available, on a cost basis."*

So there is no question of the arbitral award remaining confidential to the parties. The fact that all members of the class, whether notified or not, are bound by the Final Award (unless they have taken positive steps to opt out, where exclusion is permitted) necessarily means that such an award has to be in the public domain. Indeed the AAA has established an online Class Arbitration Case Docket.[454] Cases are listed in the docket alphabetically by the name of the first listed respondent in each case. All awards including the Clause Construction Award, the Class Determination Award and the Final Award and other relevant information can be readily accessed.[455]

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454 http://adr.org/sp.asp?id=25562.

455 Rule 9(b) requires the Class Arbitration Docket of arbitrations filed as class arbitrations to provide certain information to the extent known to the AAA including:
- a copy of the demand for arbitration;
- the identity of the parties;
- the names and contact information of counsel for each party;
- a list of awards made in the arbitration by the arbitrator; and
- the date, time and place of any scheduled hearings.

It can therefore be seen that serious inroads into the traditional approach to the privacy of the parties and the confidentiality of the proceedings are a necessary consequence of the new class arbitration procedures. Rule 9 is entitled "Confidentiality: Class Arbitration Docket." Rule 9(a) stands in stark contrast to the established principle in two-party and traditional multi-party arbitration which puts great store by the confidentiality of the proceedings, the parties essentially not wishing to air their dirty linen in public. Rule 9(a) makes clear that such an approach is simply not feasible in opt-out class arbitration:

> *"The presumption of privacy and confidentiality in arbitration proceedings shall not apply in class arbitrations. All class arbitration hearings and findings may be made public, subject to the authority of the arbitrator to provide otherwise in special circumstances. However, in no event shall class members or their individual counsel, if any, be excluded from the arbitration hearings."*

Special rules are clearly appropriate to govern settlement, voluntary dismissal and compromise of class arbitration proceedings. They are to be found in Rule 8. The primary sub-rules are to be found in Rules 8(a)(1) and (3). Under Rule 8(a)(1), any settlement, voluntary dismissal or compromise of the claims, issues or defences is not effective unless approved by the arbitrator. It is open to the arbitrator under Rule 8(a)(3) to approve such a settlement, voluntary dismissal or compromise that would bind class members, but only after a hearing and on his finding that such determination would be fair and reasonable. Before conducting that hearing, the arbitrator must direct that reasonable notice be provided in a reasonable manner to all class members who would be bound by the proposed disposition of the proceedings.[456]

Rule 8 sets out various provisions enabling the arbitrator to ensure that the settlement or other disposition is fair to all class members. In particular he may refuse to approve a settlement unless it affords a fresh opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but chose not to do so.

2.2. JAMS Class Arbitration Procedure

Following the decision in *Bazzle*, JAMS also proceeded to draft class arbitration rules. These are known as the JAMS Class Arbitration Procedures or JAMS Procedures for short. After the threshold issue whether on its proper construction the arbitration agreement permits class arbitration, the JAMS Procedures, like the AAA's Supplementary Rules, provide for a similar three-stage process, with the Class Determination stage being closely modelled on Rule 23 of FRCP and in like terms to the corresponding provisions in the AAA Supplementary Rules.

[456] AAA Supplementary Rules, Rule 8(a)(2).

2.3. Class Actions in the UK

We have set out in some detail the requirements and procedures applicable under Rule 23 of the FRCP, and the corresponding rules and procedures contained in the AAA Supplementary Rules for Class Arbitration and the JAMS Procedures because, when we use the expressions "class actions" and "class arbitrations" in the present context, we mean procedures of this kind.

The essential feature of this kind of class action or arbitration is that a member of the class is deemed to be party to the action in court or the arbitration unless they specifically elect to be excluded.

We have no procedures in English law comparable to class actions of this kind. What we do have in English civil procedure are representative actions, and specifically the ability to apply for what is known as a Group Litigation Order (GLO) under the English Civil Procedure Rules (CPR) – see section 12 below. It should be noted that there is no equivalent of a GLO under Scots law, though the matter is understood to be under consideration.[457]

However, a GLO is essentially a case management decision which enables the court sensibly to manage various separate court actions which have already been commenced or are about to be commenced and which raise or are likely to raise the same or similar issues of fact or law. There is no question of anyone who has not commenced proceedings and for whatever reason has no intention of doing so being deemed to be party to an action commenced by others and bound by the outcome. We discuss the CPR and GLOs in more depth below.

The experience from the US shows that in some consumer contexts, the class action may be a more suitable method to resolve certain disputes than a GLO. For example, in relation to certain standard wording in consumer contracts, an issue of construction ought to be determined in a way that binds fully all those potentially affected (as happens in class actions in the USA). Such a mechanism avoids the problem of the same issue being tried before different judges in different courts with different results.

3. Class arbitrations in the UK (England and Wales)

This section deals with class arbitrations in English law. Section 7 below addresses the position under Scots law. As we have just seen, and subject to the continuing debate as to the enforceability of waiver clauses, class arbitrations have developed in recent years in the United States as a result of the existence of class actions in the

457 *See* the report of Lord Gill published in 2009 (in particular Chapter 13), available to download at http://www.scotcourts.gov.uk/civilcourtsreview/.

federal court system and the willingness of the courts to permit class arbitrations to take place where the parties are subject to an arbitration agreement which does not on its proper construction preclude class arbitration.

The position in English law is similar to that in the FAA, inasmuch as there can be no consolidation of arbitrations or concurrent hearings without the consent of the parties. Section 35 of the Arbitration Act 1996 is in the following terms:

> *"Consolidation of proceedings and concurrent headings.*
> *(1) The parties are free to agree –*
> *that the arbitral proceedings shall be consolidated with other arbitral proceedings, or*
> *that concurrent hearings shall be held,*
> *on such terms as may be agreed.*
> *(2) Unless the parties agree to confer such power on the tribunal, the tribunal has no power to order consolidation on concurrent hearings."*

It can therefore be seen that the "consolidation model" as it has just been described, simply does not exist in English law. Under section 35(2) of the Act, the tribunal has no power to consolidate arbitrations (and there is no default power under which the Court could do so) unless the parties agree; and that means actual parties to existing or contemplated arbitration proceedings, not persons who are deemed to be parties because they have not opted out as per US class arbitrations.

The absence of class actions in English law and practice has the consequence that the catalyst for the development of opt-out class arbitrations as in the American model does not exist in England, and that combined with the fact that neither the Court nor the tribunal is empowered to order consolidation unless all parties agree, means that there is stony ground here for the development of class arbitrations, at least in the absence of legislative change.

3.1. The principal obstacles in the way of class arbitrations under English law

The starting point for any consideration of contemporary English law and practice in the field of arbitration is the Arbitration Act 1996. The practice of arbitration in England, particularly international arbitration, much of it taking place in London, has for many years been a major export earner involving considerable numbers of experienced practitioners, specialist judges in the Commercial Court and a wealth of judicial precedent. It was the existence of this body of practice and experience that led Parliament not simply to adopt wholesale the Model Law, although the draftsman kept reasonably close to the Model Law by incorporating several of its key principles. The Act itself combines consolidation with reform where that was needed, all expressed in user-friendly language.

The Act draws an important distinction between those of its provisions which are mandatory (i.e. effective notwithstanding any agreement to the contrary[458]) and those which are not. The mandatory provisions are identified in Schedule 1. The other provisions in Part 1 of the Act are described as "non-mandatory", so that the parties are allowed to make their own arrangements by agreement (but such provisions apply in the absence of any agreement). Included in the list of provisions which are mandatory are section 33, entitled "General duty of the tribunal", section 40 – "General duty of parties", section 66 – "Enforcement of the award" and sections 67 and 68, concerning challenges to an award.

The principal issues that arise in this context concern party autonomy and confidentiality. The following section addresses these issues in connection with US-style opt-out class arbitration. Later on, we will examine group arbitration, particularly in the context of rules such as the 2012 ICC Arbitration Rules (which permit consolidation of arbitrations in certain circumstances), and the new LCIA Rules which have yet to be considered by that organisation but which (we understand) may also for the first time permit consolidation, and in that connection we will revert to the same issues of party autonomy and confidentiality.

3.2. Party autonomy under English law

One of the central features of the UNCITRAL Model Law on Arbitration of June 1985 was party autonomy over the arbitral proceedings, and that remained the case when the Model Law was modified in 2006. Likewise, in the 1996 Act, the right of the parties to control as much of the arbitral process as is consistent with the public interest is of paramount importance.

Unusually (at least for legislation passed by the UK Parliament) but very helpfully, section 1 sets out certain "General Principles" on which Part 1 of the Act is founded. It states as follows:

The provisions of this Part are founded on the following principles, and shall be construed accordingly —

a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; and
c) in matters governed by this Part the court should not intervene except as provided by this Part".

458 Arbitration Act 1996, section 4(1).

Although there are definitions contained in section 82(1) of the Act, there is no definition of the words "party" or "parties", both of which appear throughout the statute. The word "claimant" is stated to include a counter-claimant, but that takes the point no further. Section 82(2) provides little assistance: it states that references in Part 1 of the Act to "a party to an arbitration agreement" includes "any person claiming under or through a party to the agreement". It is clear beyond doubt that references in the Act to a "party" or "parties" to arbitration proceedings do not extend to include persons who have not in fact commenced such proceedings in their own right and who would be deemed in US-style class arbitrations to be party to the proceedings because they had chosen not to elect to opt out of the arbitration.

A different and wider approach to the meaning of "party" and "parties" would infringe governing principle (b) set out above. Plainly a person who is deemed to be a party to arbitration proceedings, whether or not he is aware that he is a member of a certified class, cannot sensibly be said to be free to agree how a dispute, which he may not even know exists, should be resolved. This must count as one of the fundamental objections to class action arbitrations, since arbitration is naturally and historically based on consent rather than coercion.

There are many provisions in the 1996 Act that in our view are clearly limited to persons who have commenced arbitration proceedings in their own name or are named respondents to such proceedings. We do not propose to refer to any more than a handful. Section 14, for example, deals with the commencement of arbitral proceedings. This is a non-mandatory provision. It provides that the parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of Part 1 of the Act as well as for limitation purposes (section 14(1)). Subsections 14(2)-(5) contain various default provisions which apply if there is no such agreement.

Where, for example, the arbitrator is named or designated in the arbitration agreement, proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice requiring him or them to submit that matter to the named or designated arbitrator. We are confident that the Court would not construe this provision to include anyone who had not actually commenced proceedings in his own name but who was merely a deemed party by reason of his membership of a certified class. Likewise, notice of proceedings has to be served on the party who is respondent and that would not include deemed respondents.

Section 9(1) provides for a stay of legal proceedings where such proceedings are brought in respect of a matter which has been agreed to be referred to arbitration. The party seeking a stay can apply to the Court for a stay "upon notice to the other parties to the proceedings". Were opt-out class action litigation to be part of the English scene, it would be impossible for the applicant to give notice to the other parties to the court proceedings because in many cases where the class is of any

size he would not know the names and contact details of the "deemed" members of the class.

Section 30 confers on the tribunal the competence to rule on its own jurisdiction, unless the parties have agreed otherwise. The default rule in section 30(1) provides that the tribunal may (unless otherwise agreed) rule whether there is a valid arbitration agreement, whether the tribunal is properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement. It would be under this section that a challenge to the jurisdiction of the tribunal could be made by a person who found himself being made a party to proceedings which he had not authorised or commenced, assuming of course that he found out what was happening. Section 31(1) – which is a mandatory provision – requires any objection that the tribunal lacks substantial jurisdiction to be "raised by a party" not later than the time he takes the first step in the proceeding. But that of course assumes that he is in fact a party to the proceedings. It is clear that the draftsman did not contemplate that there could be parties to arbitral proceedings other than those actually commencing proceedings in their own name or named as respondents.

We now turn to two important sections, both of which are mandatory. Section 33 is entitled "General duty of the tribunal", and is in the following terms:

> *"33 (1) The Tribunal shall —*
> *a) act fairly and impartially* ***as between the parties****, giving* ***each party*** *a reasonable opportunity of putting his case and dealing with that of his opponent, and*
> *b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matter falling to be determined.*
> *(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decision on matters of procedure and evidence and in the exercise of all other powers conferred on it."*
> [Emphasis added].

In this section, the draftsman has referred specifically to "the parties". This would seem to be a reference to the parties to the specific arbitration agreement (under which the tribunal derives its jurisdiction), between whom there is now a dispute that the tribunal is mandated to resolve in a fair and impartial manner as between those parties. The same applies to the expression "the parties" in section 40. Section 40(1) places an obligation on "the parties" to "do all things necessary for the proper and expeditious conduct of the arbitral proceedings". It is inconceivable that an English court would construe the words "the parties" as extending to cover persons who in a US-style class arbitration are within a certified class and have not chosen to opt out of the arbitration but who are otherwise not named in the proceedings

or involved in any other way. For class arbitrations of this kind to be sanctioned in English law, significant legislative change would quite obviously be necessary.

Were a tribunal having its seat of arbitration in England to attempt to certify a class and seek to permit a class arbitration along the lines of the AAA Supplementary Rules or the JAMS Procedures, it could in our view be successfully challenged under sections 67, 68 and possibly 69 of the Act (appeals on a point of English law, which are allowed in the absence of a waiver against any such appeals). The only difficulty about doing so is that each of these sections refers to a challenge being made (or in the case of section 69 an appeal being made) by a "party to arbitral proceedings", and of course the challenge or appeal would be made by a person whose case is that he is **not** a party to any of the arbitral proceedings. But that is addressed by section 72 of the Act, which provides that a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings is fully entitled to challenge any award made against them on the grounds of lack of jurisdiction[459] or serious irregularity,[460] or indeed to question whether there is a valid arbitration agreement which binds them.

An applicant under section 72 would be justified in challenging an award on grounds of lack of substantive jurisdiction if it were to be made purporting to apply to persons whose only participation was because they were members of a certified class who had not chosen to opt out but who had no other involvement in the proceedings. Likewise, such a person would be able to challenge an award on the ground of serious irregularity under section 68 of the Act if a tribunal sought to reproduce a US-style class arbitration by instructing the representative claimant to notify members of the class it had certified of the existence of the proceedings and warning them that unless they chose to opt out they would or might be bound by any subsequent determination or disposition. Section 68(2) identifies various types of serious irregularity which can be the foundation for a challenge if the Court considers that substantial injustice has been or will be caused to the applicant, such as

a) any failure by the tribunal to comply with its general duty under section 33,
b) the tribunal exceeding its powers or
c) a failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

Section 69 permits an appeal on a point of English law provided there has been no exclusion of this right (which exclusion is contained in the ICC and LCIA Rules of Arbitration in the form of a waiver). Permission to appeal would be needed to be given by the Court and the grant of permission is circumscribed by section 69(3). But we believe that the legal issues that would arise in the circumstances we are

459 Under the Arbitration Act 1996, section 67.
460 *Ibid.*, section 68.

presently considering are of such a fundamental nature that the Court would be bound to give leave. If a class arbitration were to be launched in England and an aggrieved member of the alleged class were to became aware of the fact or the tribunal were to sanction such an arbitration, the aggrieved complainant might well decide to bring proceedings for injunctive or declaratory relief under section 72(1) of the Act against the representative claimant in the arbitration and quite possibly against the arbitral tribunal.

All of the issues we have been considering under this rubric can be traced back to the concept of party autonomy as it is understood in English practice of arbitration and against which understanding the 1996 Act was drafted (and indeed enshrined in Section 1(b) of the Act). We now turn to the specific issues of privacy and confidentiality, settlement and notification of the award, all of which can of course be seen as aspects of party autonomy, although we prefer to consider them separately.

It can be seen that confidentiality is a real problem in relation to US class arbitrations. Rule 9 of the AAA Supplementary Rules states that the presumption of privacy and confidentiality in arbitration proceedings does not apply to class arbitration. Confidentiality simply cannot apply where others beyond those named in the proceedings are members of a certified class who will be bound by the result unless they elect to opt out and (where that is feasible) are permitted to do.

During the passage of the Arbitration Bill through Parliament, consideration was given to whether a fourth general principle should be inserted into section 1 to the effect that in arbitrations, documents produced in connection with the arbitration and the resulting awards are private and confidential. But it became apparent that the difficulties in the way of drafting a satisfactory provision were very considerable. The solution ultimately adopted was not to include a statutory provision of this kind but to allow the common law on the subject to evolve in the normal way as the courts mould the law to provide pragmatic solutions to different factual scenarios.[461] To that end section, 81(1) of the Act contains a saving for certain matters governed by the common law, so far as any such rules are consistent with the Act. This saving includes the common law rules relating to arbitral confidentiality.

The Arbitration Bill was the subject of a Report by the Departmental Advisory Committee on the Arbitration Bill published in February 1996 and a Supplementary Report published in January 1997. Although both reports are in the public domain, neither is now easily available online or in print.[462] The reports are known as the DAC Reports and judicial reference is often made to either or both of them when contentious issues arise as to the meaning or effect of any particular provision in

[461] The drafters of the Scottish Arbitration Act 2010 saw no such difficulty and there is an express provision in that statute relating to confidentiality : see section 7 below.

[462] The two reports are reprinted as Annexes in many of the standard English texts on the Arbitration Act 1996.

the Act. The applicable rules were neatly summarised in paragraph 11 of the first DAC Report in the following terms:

> *"Privacy and confidentiality have long been assumed as general principles of English commercial arbitration, subject to important exceptions. It is only recently that the English courts have been required to examine both the legal basis for such principles and the breadth of certain of these exceptions, without seriously questioning the existence of the general principles themselves".*

Then there follows a passage revealing the extent of intellectual turbulence that would be created if English arbitral practice were to embrace US-style class arbitrations with the concomitant abandonment, in that context at least, of the existing rules of arbitral confidentiality:

> *"12. In practice, there is also no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features of English arbitrations (e.g. see survey of users amongst the 'Fortune 500' US corporations conducted for the LCIA by the London Business School in 1992). Indeed...it would be difficult to conceive of any greater threat to the success of English arbitration than the removal of the general principles of confidentiality and privacy".*

Since that Report was produced in February 1996, the common law on the subject of confidentiality in arbitration has continued to evolve – see the Court of Appeal decision in *Emmott v Michael Wilson & Partners Ltd*[463] But there is no reason to suppose that the general approach of the English Courts and English practitioners has changed or is likely to change in the foreseeable future. In this regard, the law in Scotland may well evolve more quickly, in the light of the express inclusion in the Arbitration (Scotland) Act 2010 of a duty of confidentiality.

3.3. Settlement

Both the AAA Supplementary Rules (Rule 8) and the JAMS Procedures (Rule 6) contain provisions necessary to ensure that any settlement or compromise is fair to all members of the class.

Section 51 of the Arbitration Act (dealing with settlement) provides (subject to any agreement to the contrary) that if the parties to an arbitration proceeding in England settle the dispute, the tribunal shall terminate the substantive proceedings and, if requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award. Section 51(3) provides that an agreed award shall state that it is an award of the tribunal and shall have the same effect as any other award on the merits of the case.

463 [2008] 1 Lloyd's Rep 616.

Under section 51(4), an agreed award is subject to sections 52 to 58 of the Act. Section 52 (another non-mandatory provision) allows the parties to agree on the form of the award and if it is an agreed award or the parties have agreed to dispense with reasons then no reasons have to be given. This is important because an award without reasons disables any appeal on a point of English law under section 69. Section 55 (again non-mandatory) states that the parties are free to agree on the requirements as to notification of the award to the parties. If there is no such agreement, the default rule is that the award shall be notified to the parties by service on them of copies of the award.

Under section 58(1), unless otherwise agreed by the parties, the award is "final and binding both on the parties and on any persons claiming through or under them".

In all of the sections of the Act just considered, the expression "the parties" in our view clearly carries the traditional meaning we referred to earlier and is not wide enough to cover persons who are not named as parties to the proceedings, except in relation to the concluding words of section 58(1), i.e. the award being binding on persons "claiming through or under" such a party. Were any wider meaning to be attributed to those words, and a settlement were to be binding on the non-named class member who had not opted out, such a person would be devoid of protection in relation to any settlement. It takes little imagination to appreciate the extent of abuse that could and probably would occur to the detriment of such "deemed parties".

3.4. Other obstacles

There are a number of other legal obstacles that would prevent US-style class arbitrations from taking root in English soil. We have in mind, for example, the fact that under the *Unfair Terms in Consumer Contracts Regulations* 1999,[464] read together with section 91(1) of the Arbitration Act, an arbitration agreement in a contract to which a consumer is party is to be taken to be unfair for the purposes of those Regulations (and therefore unenforceable) where the claim is for a modest amount (currently £5,000 or less).

There are also considerable impediments to the enforcement of foreign class arbitration awards in England, which we address separately below. What can be said with a degree of confidence is that many essential features of US class arbitrations are quite contrary to the culture of English arbitration, a culture which has developed over many decades in a country where arbitration is a well-established and frequently resorted-to method of dispute resolution. A class arbitration would also be incompatible with many provisions in the 1996 Act as it currently stands, so that legislation would need to be introduced if there were felt to be reason for it to become part of our legal armoury.

464 *See* http://www.legislation.gov.uk/uksi/1999/2083/contents/made.

4. Other forms of collective redress available in English law

As we have seen, class actions in the way they take place under Rule 23 of the FRCP in the US form no part of the English legal scene. But the rules of court which apply to court proceedings in England and Wales do make provision for representative actions and what is called group litigation.

In this section we briefly examine these two procedures, before turning to consider whether anything similar exists in English arbitration and if it does, whether there is any incompatibility with, or difficulties under, the Arbitration Act. We do so primarily because the catalyst for the introduction of class arbitrations in the States has been Rule 23 of the FRCP and if similar provisions do not exist in England there may be limited appetite for class arbitrations here (in the absence of legislative change introduced either by the UK Parliament or by the European Commission).

Court proceedings in England are governed by the Civil Procedure Rules of 1998 (the CPR). They are described as a single body of court rules, supplemented in certain respects by practice directions. In a similar fashion to section 1 of the Arbitration Act, the Rules begin by a statement of their "overriding objective"[465], which is to "enable the court to deal with cases justly". They go on to state that dealing justly with cases includes, so far as practicable, ensuring that the parties are on an equal footing[466] and ensuring that the case is dealt with expeditiously and fairly.[467]

Part 19 of the CPR is entitled "Parties and Group Litigation". We are concerned in the present context particularly with CPR rule 19.6, headed "Representative parties with some interest" and rules 19.10—19.15, concerned with Group litigation. The basic distinction is that under rule 19.6 the representative parties and those persons representing must have the "same interest" whereas group litigation under CPR rule 19.10 et. seq. operates where there are common or related issues of fact or law.

Historically, representative actions go back a long way. As Jessel M.R. mentioned in *Commissioners of Sewers of the City of London v Gellatly,*[468] as far back as the middle of the 18th Century, the practice of the Court of Chancery was to require the presence of all parties interested in the matter and to do that by selecting where "one multitude of persons are interested in a right" some individuals to represent the rest "so that the right might be fairly decided as between all parties in a suit so constituted".

This same principle is now to be found in CRP rule 19.6. In deciding whether the representative party and the persons whom that party claims to represent enjoy the same interest, this requirement has been construed by the courts to mean

465 CPR rule 1.1(1).
466 CPR rule 1.1(2)(a).
467 CPR rule 1.1(2)(d).
468 (1876) L.R. 3 Ch. D. 610 at 615.

that they must share an identical interest or a virtually identical interest. Although it has sometimes been said that the courts have in recent years demonstrated a more liberal approach to what constitutes the same interest, the truth is that the practice under this rule is far removed from the way in which Rule 23 of the FRCP is drafted and operates.

Before turning to what the practice is, it is relevant to note that CPR rule 19.7 is entitled "Representation of interested person who cannot be ascertained etc." This rule only applies to claims concerning (a) the estate of a deceased person, (b) property subject to a trust or (c) the meaning of a document (including a statute), so the ambit of this sub-rule is limited to these three specific situations. Where it applies, the court may make an order appointing a representative essentially where the persons to be represented are unborn, cannot be found or cannot easily be ascertained. Where rule 19.7 applies, the court's approval is required to settle the claim and it will only do so where it is satisfied that the settlement is for the benefit of all the represented persons.

CPR rule 19.6(5) provides that rule 19.6 does not apply to a claim to which rule 19.7 applies. The implication is that, except in the case of the three very specific types of claim referred to in rule 19.7(1), the members of the class represented, if not actually found, must be ascertainable. That is effectively what the Court of Appeal recently decided in the important case of *Emerald Supplies Ltd v British Airways Plc*.[469]

The *Emerald* case was basically an attempt using CPR rule 19.6 to set up a US-style class action. This attempt was described by Mummery LJ (who gave the lead judgment) as a "procedural novelty".

Emerald brought representative proceedings against BA for breach of statutory duty in allegedly fixing airfreight charges. Emerald purported to appoint itself as representative of groups of consumers of the freighted goods, being direct or indirect purchasers of air freight services the prices for which were allegedly inflated by anti-competitive agreements or concealed charges. The claim was for a declaration of liability on the part of BA. It was accepted by Emerald that individual claims for damages could not be dealt with under rule 19.6 and would have to be proved individually.

The judge at first instance struck out the representative element of the action. That decision was upheld by the Court of Appeal, which described the case as "fatally flawed". The reason was that Emerald was unable to demonstrate that those represented in the action all had "the same interest". The criteria for inclusion in the represented class was that such persons were direct or indirect purchasers of air freight services the prices for which had been inflated by one or more of the

469 [2010] EWCA Civ. 1284, [2010] WLR (D) 294.

alleged agreements or concerted practices. The problem was that inclusion in the class according to these criteria would be dependent on the outcome of the action.

The Court of Appeal stated as follows:

> *"The fundamental requirement for a representative action is that those represented in the action have 'the same interest' in it. At all stages of the proceedings, and not just at the date of judgment at the end, it must be possible to say of any particular person whether or not they qualify for membership of the represented class of persons by virtue of having 'the same interest' as Emerald".*[470]

The consequence is the persons represented in this procedure have to be ascertainable at all stages of the proceedings. This is a threshold requirement and must be satisfied before the Court's discretion under rule 19.6(2) to direct that a person may not act as a representative comes into play.

Among the reasons for the court taking a relatively restricted view of the ambit and operation of rule 19.6 is that representative proceedings under this rule involve a single action, which assumes that no individual assessment of particular represented persons or their claims is necessary. The decision in a representative action will necessarily apply to all the parties and all the represented persons. Moreover under rule 19.6, the court does not have the control over the proceedings and any settlement which the US judge has under Rule 23 of the FRCP and to some extent an English judge will have where a Group Litigation Order is made under CPR Part 19.

5. Group litigation in England

Group Litigation Orders (GLOs) came into English civil procedure as a result of amendments to the CPR in 2000.[471] CPR rule 19.10 defines a GLO as an order made under rule 19.11 "to provide for the case management of claims which give rise to common or related issues of fact or law" (described in rule 19.10 as the "GLO issues"). The rules governing group litigation are to be found in rules 19.10—19.15, as supplemented by Practice Direction 19B – Group Litigation.

CPR rule 19.11(1) states that the court may make a GLO where there are or are likely to be a number of claims giving rise to the GLO issues (as just defined). A GLO must contain directions about the establishment of a group register on which the claims managed under the GLO will be entered,[472] specify the GLO issues which will identify the issues to be managed as a group under the GLO[473] and specify

[470] [2010] EWCA Civ. 1284 at [62].
[471] Civil Procedure (Amendment) Rules 2000 (S.I.2000/221).
[472] CPR rule 19.11(2)(a).
[473] CPR rule 19.11(2)(b).

the management court which will manage the claims on the group register.[474] The same rule goes on to set out case management guidelines to ensure that all claims raising GLO issues are handled in an efficient manner.[475]

The effect of the GLO where a judgment or order is given or made in a claim on the group register is that the judgment or order is binding on all the other claims on the group register when the judgment is given or the order is made unless the court orders otherwise.[476] Specific provision is made in relation to disclosure of documents. Unless the court otherwise orders, disclosure of any document relating to the GLO issues by a party to a claim on the group register is disclosure of that document to all parties to claims on the group register or those which are subsequently entered on that register.[477] Also included in the court's case management powers is the ability to give directions appointing the solicitor of one or more of the parties to be the lead solicitor for the claimants or defendants.

The group litigation rules approximate a little more closely to the powers of the court under Rule 23 of the US FRCP, but they come nowhere near the degree of control that exists under Rule 23. What is of central importance to note is that unlike Rule 23 FRCP, where persons are deemed to be parties in a certified class unless they have elected to opt out, the group litigation rules under the English CPR only apply to the extent that a claimant has initiated proceedings by the issue of a claim form or is proposing to do so. In *Boake Allen Ltd v Revenue and Customs Commissioners*[478] in 2007, Lord Woolf made a number of observations about the group litigation scheme.

Referring to the overriding objective of the scheme he pointed out:

> *"31. All litigants are entitled to be protected from incurring unnecessary costs. This is the objective of the GLO regime. Primarily, it seeks to achieve its objective, so far as this is possible, by reducing the number of steps litigants, who have a common interest, have to take individually to establish their rights and instead enables them to be taken collectively as part of a GLO Group."*

Lord Woolf then turned to identifying the parties covered by a GLO:

> *"32. Before a GLO can be made it is necessary for each individual potential member who wishes to join the GLO to make an individual claim under CPR Part 7 or Part 8. This in conjunction with the application to register enables the court to determine whether the respective litigants qualify to be a member of the GLO."*

474 CPR rule 19.11(2)(c).
475 CPR rule 19.11(3); see also rule 19.13.
476 CPR rule 19.12(1)(a).
477 CPR rule 19.12(4).
478 [2007] 3 All E.R. 605.

This then is the crucial difference between US class actions under Rule 23 of the FRCP and group litigation under rule 19.10 *et seq* of the CPR. Under the CPR there is no opt-out regime under which a person is taken to be a party unless he takes steps to opt out. It is this feature of US class actions (and now reproduced in US class arbitrations) that leads to fundamental incompatibility with existing arbitral practice and legislation in England.

Collective redress in arbitration and compatibility with English law

In addressing this issue we leave to one side for the present issues concerning enforcement in England of US style class arbitration awards. Given that the collective redress regime in England is very different from that which prevails in the US, the factors which led the US courts to embrace class arbitrations do not exist, or do not exist to anywhere near the same extent, in England. The enforcement of US antitrust laws by encouraging private litigation not least by the remedy of triple damages would be undermined if those guilty of anti-competitive conduct could bind their contracting parties to arbitration agreements with no possibility of collective arbitral redress. Considerations of this kind apply with less force in the UK where triple damages claims do not exist.

It will be recalled that the state jurisdictions in the US where class arbitrations have tended to flourish are those where the courts have the power to order the consolidation of arbitrations. We have already seen that in England the tribunal has no power to order consolidation of arbitrations or indeed concurrent hearings unless the parties agree to confer that power on the tribunal. Nor has the court in England any such power: section 35(1) provides that the parties are free to agree on consolidation, the corollary being that the court has no power to impose consolidation on them in the absence of their agreement. We have referred to consolidation again because the international arbitral institutions are beginning to change their rules to permit consolidation in certain circumstances.

The current state of play in England as regards class arbitrations appears to us to be as follows. Class actions along the model of Rule 23 FRCP do not exist in England. That means that there is presently little or no incentive or possibility given the current legislation to introduce class arbitrations here, without purposive legislative change. The representative action in English practice as it currently applies is far removed from the US style class arbitration. The need for all persons to be parties to the action (except in the very limited and exceptional cases covered by rule 19.7) and for all such persons to have "the same interest" mean that it cannot fulfil the role that class actions play in the US. So there is little reason to mimic it by way of a similarly constructed arbitration.

The Group Litigation procedure introduced 12 years ago is essentially a case management tool where a number of actions are brought which raise common or related

issues. There is no equivalent mechanism available in English arbitrations. Under the Arbitration Act 1996, arbitrators have wide powers of case management that they are encouraged to use. However, tribunals are obliged to adopt procedures suitable to the circumstances of the particular case, and may – subject to any applicable institutional rules – determine all procedural and evidential issues as they see fit. The underlying idea behind these two principles is that there is no reason for arbitrators to blindly reproduce court procedures, as long as they adopt a procedure which is consonant with due process. As the DAC Report put it,[479] these provisions of the Act are designed "to explode the theory that an arbitration has always to follow Court procedures". However, as we have just seen, the group litigation procedure under CPR rule 19.10 et. seq. requires all persons who are covered by it to be actual parties to relevant sets of proceedings. So that excludes the opt-out procedure of US class arbitrations. The consequence is that even with the powers to consolidate now to be found in the 2012 ICC Rules and something similar likely to be adopted by the LCIA, it is still not possible to reproduce in arbitration anything similar to the US style class arbitration.

6. Enforcement of foreign class arbitrations in England

For all practical purposes, formal enforcement of foreign arbitral awards in England and Wales is now exclusively governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[480] This regime applies regardless where the arbitration has taken place (i.e. there is no need for the award to have been made in the territory of another Convention state).

One can immediately see how problems would arise in relation to any attempt to enforce a class action award made in e.g. the US. First of all, the requirements for enforcement include production of the original arbitration "agreement" (or a certified copy). In the case of large consumer cases (e.g. as in AT&T), it would seem that the enforcing party (which we may assume will be the consumers collectively rather than the company) will not be able to produce one single arbitration agreement – but rather one between the members of the enforcing representative and the company.

Take the *Bazzle* case – assume a hypothesis whereby Mr and Mrs Bazzle obtain a class award in the US against Green Tree. They attempt to enforce it against Green Tree's assets in England. They would presumably be able to produce their own arbitration agreement and the Award itself (or a certified copy). However, the Award is unlikely to reflect the one arbitration agreement: by definition, it will be an award reflecting the damages awarded to the class as a whole. Enforcement will be

479 DAC Report, paragraph 153.

480 The provisions of the New York Convention have been incorporated into the Arbitration Act 1996 – see sections 100-103. All signatories to the New York Convention by definition cease to be parties to the 1927 Geneva Convention and there are no known major trading nations that remain parties to the latter Convention.

difficult in respect of any successful class action claimant who does not specifically participate in the enforcement proceedings with sufficient proof of both (a) their original agreement and (b) their entitlement to claim.

Although the standard defences under the New York Convention may be available, it is perhaps only the due process requirement that may be called into play, although this is unlikely to be relevant to any enforcement actions brought against the supplier, save insofar as the supplier attempts to resist enforcement in respect of those claimants who cannot prove to have been given notice of the proceedings. The jurisdictional defence may come into play as against those members of the class who did not participate in the arbitration, but it is expected that the issue as to jurisdiction would have been considered and perhaps adjudicated upon in the US courts, being the courts of the seat (or the putative seat) of the arbitration.

The only other possible defence that a supplier may raise as against the class as a whole in relation to an action to enforce an Award against it in England, arising out of a class arbitration in the US, is one based on public policy, enshrined in Article V(2) of the New York Convention.

However, it is difficult to see how a supplier seeking to avoid enforcement might successfully invoke the public policy exception to enforcement. The respondent would probably not be able to point to any particular manifest disregard of its rights (at least not such as would go beyond a breach of the due process requirement). Ignoring for example any punitive damages element (which would ordinarily be severable from the non-punitive element), the public policy exception (which must always be referable to the public policy of the enforcing state) is not considered likely to represent too much of a problem for class action claimants seeking to enforce their award.

7. Scotland[481]

The position in Scotland is almost identical to that of England: there is no known procedure for class actions, let alone class arbitrations.

For Scottish arbitrations, the relevant legislation is the Arbitration (Scotland) Act 2010. Although similar to the English Arbitration Act 1996 in many ways, the Scottish legislation is closer to the Model Law, whose provisions are incorporated. In contrast to the English statute, the 2010 Act separates the procedural rules (the Scottish Arbitration Rules) into a Schedule. Some of the legislative provisions are mandatory and applicable regardless of any attempt by the parties to contract out of them; and others merely applicable by default.

[481] We gratefully acknowledge the input of Hew Dundas, chartered arbitrator DipICArb, in respect of Scots law.

Consumer arbitrations in Scotland are in fact governed by the relevant provisions in the 1996 Act, which applies throughout the United Kingdom.

One key difference between the English and Scottish Acts lies in the fact that the latter includes an express statutory confidentiality provision (though it should be noted that the provision is non-mandatory).

Under this rule, disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure is authorised, expressly or impliedly, by the parties (or can reasonably be considered as having been so authorised), or is required by the tribunal or is otherwise made to assist or enable the tribunal to conduct the arbitration; or is required in order to comply with any enactment or rule of law, for the proper performance of the discloser's public functions, or in order to enable any public body or office-holder to perform public functions properly; or can reasonably be considered as being needed to protect a party's lawful interests; or is in the public interest; or is necessary in the interests of justice; or is made in circumstances in which the discloser would have absolute privilege had the disclosed information been defamatory.

Furthermore, the rule in Scotland obliges both the tribunal and the parties to take reasonable steps to prevent unauthorised disclosure of confidential information by any third party involved in the conduct of the arbitration. In this regard, "confidential information" means any information relating to the dispute, the arbitral proceedings, the award or any civil proceedings relating to the arbitration which is not, and has never been, in the public domain.

As to consolidation of arbitrations, while a provision exists in the 2010 Act, it is not expected to be widely adopted, and there is no provision entitling the tribunal (or a Scottish court) to compel consolidation in the absence of agreement of all relevant parties.

Although adopting different routes to those adopted in English law, the end-point is substantially identical, and the points made above in relation to English law are equally applicable in Scotland.

8. The future

In the last ten years or so there has been a lively debate both domestically within the UK and at EU level as to the adequacy of existing collective redress mechanisms, and specifically of the need for change. We are conscious of the fact that we are presently concerned with class arbitrations and arbitral remedies for addressing mass claims for compensation. We say that because the debate has been almost

entirely focussed on judicial remedies and extra-judicial dispute resolution centered on mediation and conciliation. There has been hardly any reference to mass claims in arbitration.

Any attempt to do justice to the various initiatives both in the UK and within the EU would occupy a complete book in itself. On the other hand, even to summarise the debate is liable to be misleading. What is clear to us is that the issues raised by those who share the widespread belief within EU Member States that existing collective redress mechanisms are inadequate are politically charged. It will come as no surprise that there are serious differences of opinion between consumer organisations and academic commentators on the one hand who are pressing for change and (on the other) business organisations and certain governments, particularly the French and German governments, who resist any change which might increase transactional costs and damage national sectoral competitiveness.

It is also relevant to point out that not only are there major cultural differences between the American approach to class actions compared to the European reaction; there is also an important difference between the attitude on different sides of the Atlantic to regulatory enforcement. There are essentially two different approaches to the enforcement of public interest legislation such as the anti-trust laws and that which seeks to provide consumer protection. The first is enforcement by official regulatory agencies. The second is enforcement by private action.

In the US, there has been a long tradition of allowing the private sector to be the primary means of ensuring compliance. The anti-trust legislation in the US goes back over 120 years to the Sherman Act in 1890 and the Clayton Act in 1914. To some extent this reflects the distrust that many Americans have for government enforcement. But it is mainly attributable to the fact that it was recognised that the most effective method of enforcement was to leave it to private initiative.

This has led to the development of a legal regime in the United States that encourages private action. The barriers in the way of proceedings of this kind have been deliberately lowered. There are specific incentives to private action. The ability to recover triple damages in certain cases (i.e. 300% of the damages that would be required to compensate for the actual loss) is a huge inducement to the private litigant to police the legislation and an equal deterrent to the business that is tempted to flout the rules. This is combined with contingency legal fees, so that legal action is at no significant cost to the claimant unless a positive result is achieved (and if successful, the lawyers receive a substantial percentage of the damages), as well as third-party funding by the claimant's lawyers (or others) which has a similar effect, and the absence of a "loser-pays" rule (applicable widely in EU Member States) combined with the uncertainties of jury trial, where the business defendant is at risk of an unsympathetic reaction to its case.

What is apparent to us from a recent consultation conducted by three separate EC Directorates General[482] is the very widespread hostility within Member States to the US-style class action. The features of the US system that we have just summarised have been described as a "toxic cocktail"[483] and there is widespread agreement amongst stakeholders that they should be avoided at all costs in any European response to improve access to collective remedies.

In Europe the emphasis has been on official enforcement through regulatory bodies. Private action has not figured large. In some Member States there are various systems of collective redress. In the UK in the areas of public interest legislation that we are primarily concerned with, namely, consumer protection, competition law and to a lesser extent employment, there are currently no collective redress procedures. We have already referred to the representative action and to Group Litigation Orders in England; the limitations of these mechanisms are such that they come nowhere near providing an effective collective redress machinery.

We return, very briefly given our arbitration focus, to some reflections on the recent debate in England and at the EC level concerning collective redress. It is interesting to note the change of terminology in recent years. Over the years references to "class actions" changed to "collective actions" and then from about 2008 mutated into "collective redress". Such was the desire of those participating in the debate to distance themselves from the toxicity of the American experience.

8.1. England: Competition

Very recently (to be accurate, on 24 April 2012) the Department for Business Innovation and Skills of the British government (known by the acronym "BIS") issued a consultation paper entitled "Private Actions in Competition Law: A Consultation on Options for Reform."[484] The BIS has thus initiated a three-month consultation period ending on 24 July 2012, following which it will publish its consultation response. It will be noticed from the title of the paper that it is confined to competition law.

There have been a number of initiatives and consultations by various British agencies in recent years, not all of them focussed exclusively on competition law. In November 2008, the Civil Justice Council (CJC – an independent public body, funded by the Ministry of Justice) published a report entitled "Improving Access to Justice through Collective Actions – Developing a More Efficient and Effective Procedure

482 EU's Consultation Paper "Towards a Coherent European Approach to Collective Redress" http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm.

483 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/741&format=HTML&aged 0&language=EN.

484 http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law.

for Collective Actions".[485] This contained a series of recommendations to the Lord Chancellor (the head of the Ministry of Justice in England and Wales). The first of a number of so-called "key assumptions" on which the Council based itself was that it was unrealistic to expect the Government to fund a new method of resolving collective claims outside the civil process. That was more than three years ago, yet nothing has changed (save that the constraints of government-imposed austerity have become even tighter).

This was the background to the CJC's principal proposal that a generic collective action should be introduced. The report invited a formal government response. The government did formally respond, announcing in August 2009 via the Ministry of Justice that it did "not support the introduction of a generic right of collective action."[486]

But that does not mean that various government agencies were not sympathetic to the complaint that proper mechanisms for collective redress were not available in the UK and were urgently needed. The whole issue has been caught up with the controversial debate within the EU about the need for, and the extent of, subsidiarity. It is apparent that the British government prefers to deal with the challenges of collective redress on a sectoral basis. That no doubt explains why the very recent consultation paper is limited to the competition sector.

As we have already pointed out, the BIS paper of April 2012 is far from being the first official report in this area. The British Office of Fair Trading ("OFT") produced reports in 2007[487] and 2011,[488] stating that companies and their advisors viewed private actions as the least effective aspect of the competition regime in achieving compliance.[489] The consultation paper is a mine of useful information as to the current state of play of the thinking of the British Government.

This is not the place to enter into the detail regarding the report. The government states that its ambition is to promote private sector challenges to anti-competitive behaviour. In the UK, public competition authorities are at the heart of the competition enforcement regime, although it is recognised that they have finite resources, so that they are constrained when it comes to ensuring that those who suffer loss as a result of breaches of competition laws are adequately compensated.

485 http://www.judiciary.gov.uk/NR/rdonlyres/89C90E13-461A-4BB4-8146-E0231057D558/0/CJCImprovingAccesstoJJusticethroughCollectiveActionsAseriesofRecommendationstotheLord.pdf.

486 http://lawprofessors.typepad.com/mass_tort_litigation/2009/08/uk-governments-response-to-collective-redress-in-europe.html.

487 http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf.

488 http://www.oft.gov.uk/shared_oft/consultations/OFT1335.pdf.

489 http://www.slaughterandmay.com/media/1809204/uk-competition-and-regulatory-newsletter-16-apr-29-apr-2012.pdf.

Essentially what is being proposed (subject of course to consultation) is that the powers of the Competition Appeal Tribunal ("CAT") should be expanded so that the CAT becomes "a major venue for competition actions in the UK". Section 47A of the Competition Act 1998 permits actions for compensation only when they follow on from a prior administrative decision. The government is proposing to amend that section to permit stand-alone actions. It is also proposing to introduce an opt-out procedure because experience has demonstrated that an opt-in process simply does not work, particularly where the aggregate loss is large but the loss suffered by individual potential claimants is small.

The UK government is understandably anxious to avoid the excesses, not to say, abuses of the US style class actions. So it is not proposing to change the loser-pays rule or to permit contingency fees or the recovery of anything more than compensatory damages. If these proposals are adopted, or something like them, only time will tell whether the financial inducements to third parties, in other words, third-party funders or the claimants' lawyers, to initiate proceedings are sufficiently generous to permit the procedure to achieve its intended purpose.

What matters for present purposes is that it is clear that arbitration of collective claims does not figure as a redress mechanism in the thinking of the government. One of its key proposals is to promote ADR in order to ensure that the courts are the option of last resort. But although the section of the paper dealing with ADR mentions arbitration as one of a number of ADR procedures, it is clear that what it really has in mind is some sort of mediated settlement or conciliation procedure. There is no mention whatsoever of arbitration of mass claims either along the lines of the US procedures adopted by the AAA and JAMS or by reference to a more European process resulting in a binding determination. The whole emphasis of the proposals is to direct mass compensation claims in the competition field to the CAT, where appropriate to do so.

8.2. England: Consumer affairs

It is to be noted that Council Directive 93/13/EEC[490] on unfair terms in consumer contracts creates a presumption that pre-dispute arbitration clauses in consumer contracts are unfair and, as such, invalid. This Directive has been implemented by the *Unfair Terms in Consumer Contracts Regulations* of 1999.[491] Sections 89 to 91 of the Arbitration Act 1996 are concerned with "Consumer Arbitration Agreements". Section 89(1) states that these three sections extend the (now 1999) Regulations to a term which constitutes an "arbitration agreement" whether as to present or future disputes and whether those disputes are contractual or not. The Regulations are confined to arbitration agreements between a commercial supplier and a consumer

490 http://ec.europa.eu/consumers/policy/developments/unfa_cont_term/uct01_en.pdf.
491 http://www.legislation.gov.uk/uksi/1999/2083/contents/made.

(or consumers) who is or are natural persons. Section 90 of the 1996 Act extends the operations of the Regulations to arbitration agreements between a commercial supplier and a consumer, being a legal person i.e. a company or partnership.

Section 91 of the Arbitration Act 1996, adds a further ground of unfairness to the Regulations (see paragraph 10.1 above). Section 91(1) states that a term which constitutes an arbitration agreement is unfair for the purposes of the Regulations so far as it relates to a monetary claim which does not exceed the amount specified by statutory order. The present figure is £5000, as specified in the *Unfair Arbitration Agreements (Specified Amount) Order* 1999.[492] If the sum claimed is greater than £5000, the consumer retains the right to rely directly on the Regulations so that the effect of those Regulations may be that the arbitration agreement is still held to be unfair. The consequence of section 91(1) is, of course, that if a scheme for arbitration of mass 'consumer' claims were to be developed it would necessarily have to be consensual because the arbitration agreement would be automatically invalid in so far as any claim was for £5,000 or less.

There has in the last few years been a contentious debate about the need for collective redress mechanisms in the field of financial services, particularly as regards consumers. In December 2008, the CJC published its final recommendations for improving access to justice for consumers and small businesses wishing to make collective claims.[493]

Subsequently, in the 2009-10 Parliamentary session, the government introduced into the House of Commons a Financial Services Bill, one clause[494] of which sought to introduce a right of collective action, entitled "Collective proceedings orders". It would have enabled the court on the application of a "representative" to authorise that representative to bring collective proceedings before the court in respect of specified types of financial services claims. The court would have been able to decide whether those proceedings should be on an opt-in or opt-out basis. But the clause was eventually removed from the Bill and never became law.[495]

There was no suggestion either in the CJC report or in this proposed legislation that mass claims in respect to financial services should be dealt with arbitration. Many of the types of claims the legislation was aimed at will have arisen under contractual agreements which are likely to contain arbitration agreements, albeit under existing law neither the court nor the arbitral tribunal has the power to order consolidation of separate arbitrations raising similar issues in the absence of the agreement of all parties.

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492 http://www.legislation.gov.uk/uksi/1999/2167/contents/made.

493 *See* http://www.judiciary.gov.uk/publications-and-reports/reports/civil/civil-justice-council/cjc-collective-action-for-justice.

494 Clause 18.

495 http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100407-0009.htm.

8.3. England: Employment

Experience in the United States is that a number of mass arbitration claims arise in the employment field. That could not happen under existing employment legislation in England. The reason is that arbitration agreements in employment contracts and other agreements involving workers fall foul of the statutory restrictions on contracting out contained in section 203 of the Employment Rights Act of 1996[496] ("ERA") and section 144 of the Equality Act 2010[497] ("EA").

Section 203(1) of the ERA provides that any provision in an agreement (whether a contract of employment or not) is void insofar as it purports to preclude a person from bringing any proceedings under the Act before an employment tribunal. Such a tribunal would be the appropriate forum for claims in respect of unfair dismissal and redundancy.

Similarly, section 144(1) of the EA states that a term of a contract is unenforceable by a person in whose favour it would operate in so far as it purports to exclude or limit a provision of, or a provision made under, the Act. The relevant provision is the right to apply to an employment tribunal in relation to a complaint of work-based discrimination.[498]

8.4. The European Union

The process of proposal and consultation about improving access to collective redress within Member States of the EU has in recent years been no less controversial. There have been a number of Commission initiatives in both competition and consumer fields. In 2005, the EC Competition Directorate-General published a Green Paper entitled "Damages Actions for Breach of EC Anti-trust Rules".[499] This was followed by a White Paper issued in March 2008[500] with a similar title. It proposed representative claims by trusted bodies together with an opt-in mechanism. Reports suggest that this White Paper became a draft directive, which was within days of becoming law in 2009 before being abandoned.

Meanwhile the Directorate General for Health and Consumers also produced a Green Paper[501] in 2008 on collective redress mechanisms in the field of consumer protection. But the consultation process apparently ran into real political difficulties,

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496 http://www.legislation.gov.uk/ukpga/1996/18/contents.

497 http://www.legislation.gov.uk/ukpga/2010/15/contents. We are grateful to Jane Russell, a barrister in Essex Court Chambers, who assisted us on the employment and equality aspects.

498 *See* Clyde & Co LLP v Bates van Wikelhof [2011] EWHC 668.

499 http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf.

500 http://www.scribd.com/doc/3675529/EU-WHITE-PAPER-on-Damages-Actions-for-Breach-of-EC-Antitrust-Rules.

501 Green Paper on Consumer Collective Redress, COM(2008) 794, 27.11.2008, online: <http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm>.

with the Commission concluding that "there is no easy answer to the problem"[502]. In particular the Commission's proposal to bolt on a separate system of rules to the public enforcement policy to facilitate private damage claims met with strong opposition from the German and French governments.

In 2009, the European Commission President Jose Manuel Barroso instructed the Commissioners for Competition and Consumer Affairs together with the Commissioner for Justice to draw up a unified policy on collective redress. Another consultation paper was issued in 2009, entitled "Towards a Coherent European Approach to Collective Redress".[503] It stated in terms that US-style class action was not envisaged. This was the paper that referred to the US legal system in this area as comprising a "toxic cocktail" of components.

A public consultation and hearing then followed, there being 307 distinct interventions from stakeholders in 27 Member States and in six non-EU countries. An evaluation was made by the Institut für Ausländisches und Internationales Privat und Wirtschoftsrecht.[504] A number of relevant considerations can be seen from the Executive Summary. The first is the almost universal hostility towards the US-style class action and a strong desire to avoid abusive litigation. The second is that there is virtually no reference at all to mass claims being handled by some form of arbitral process. There is a good deal of reference to various forms of ADR; but what is meant is resolution of claims by negotiated or mediated settlement not an adjudication by binding arbitration.

As we understand it, the Commission intends to publish a policy statement on collective redress following the consultation process, but only after an opinion has been obtained from the European Parliament. Coming right up to date, the Commission's Work Programme for 2012 includes an EU framework for collective redress.[505]In November 2011, the EU Commissioner for Competition[506] identified what is described as a "major initiative" designed to remove the major obstacles in the way of damages actions before national courts, in addition to which he stated that "should there be any specific provision on collective actions in antitrust" these would be consistent with the general principles to be established by the Commission.

502 MEMO/08/741, p 3.

503 http://ec.europa.eu/transparency/regdoc/rep/2/2010/EN/2-2010-1192-EN-1-0.Pdf. See also Hodges Current Discussions on Consumer Redress:Collective Redress and ADR http://www.csls.ox.ac.uk/documents/1109TrierCOLLECTIVEREDRESSANDADR.pdf.

504 http://ec.europa.eu/competition/consultations/2011_collective_redress/study_heidelberg_contributions_en.pdf.

505 http://www.fibelfin.be/nl/european-commission-work-programme-2012eu.

506 http://www.internationallawoffice.com/Account/Register.aspx?ReturnUrl+http://www.internationallawoffice.com/newsletters/detail.aspx?g=95049579-f597-48a5-89d9-cf1e9493c034.

On 2 February 2012, the EU Parliament approved a resolution on collective redress and urged the Commission to act in setting up a horizontal collective redress mechanism at EU level. The EU Parliament in particular welcomed the proposal for a crucial role of the courts in deciding the admissibility of the claim in such cases.

All the indications at EU level are that the policymakers do not envisage a role for arbitration in the resolution of mass claims, even if the claim is a contractual one involving claims under a series of similar contracts raising similar issues, each containing an enforceable arbitration agreement.

In a very interesting paper published in 2010 and entitled "Collective Redress in Europe: The New Model",[507] Professor Christopher Hodges refers to the rejection of the American model of class action and the development by EU Member States of a new model. What he describes as the three pillars of this new model are outlined by DG SANCO in its consultation paper of May 2009 following its Green Paper. Essentially what is involved is collective ADR with a view to achieving a negotiated voluntary settlement, backed up by the involvement of the public enforcement authorities, which can play a significant role in facilitating or delivering collective redress. This latter element is described by him as a "regulatory oversight".

The third pillar is a last resort back-up remedy of resort to the courts if the other means of achieving satisfactory redress do not deliver. Redress through the Courts or other judicial means would not be the primary pathway. If, as seems likely, something along these lines does develop as the European model for collective redress, there would seem to be no role for arbitral determination, whether consensual or imposed by legislation.

9. Conclusion

The absence in England and Scotland of class actions in court means that the catalyst for the introduction of class arbitration in the United States simply does not exist here. In the UK the two arbitral institutions under whose aegis most institutional arbitration is conducted are the ICC and the LCIA. It is true that the ICC 2012 Rules now permit consolidation in certain circumstances and the LCIA may shortly follow suit. But that does not mean that class arbitration will follow in England and Scotland – there are legislative obstacles of a fundamental nature which will prevent that happening in the absence of legislative change. Both the UK government and the EU institutions have been looking to improve mechanisms for collective redress but there is no reason to think that they view class arbitration as their preferred solution.

[507] (2010) 7 Civil Justice Quarterly 370.

Class Actions and Arbitration in Belgium and The Netherlands

Philippe Billiet & Laura Lozano

1. Introduction

This chapter will focus on the possibility or impossibility to provide collective redress through arbitration in Belgium and the Netherlands.

Class actions as such do not (yet) exist in Belgium or in the Netherlands. This article will therefore explore which similar but alternative forms of collective redress exist in the respective jurisdictions, with emphasizing on the potential role of arbitration.

2. Interest associations

In Belgium and in the Netherlands, certain interest associations can, under certain conditions, be party to proceedings in which they defend the interests of their members. These interest associations, be it that they *de facto* represent the interests of a group, are not to be assimilated with a 'class'. Indeed, when an interest association is party to a procedure, this does not automatically amount to its members also being party to that procedure.

2.1. Belgium

To date, the authors are not aware of any interest association in Belgium that was party to an arbitration procedure to defend a collective interest. However, interest associations have certainly, under certain conditions, the possibility to act in Belgium for a collective interest.[508] This chapter will present the current perspectives that can be found in the Belgian litigation forum, assuming that a parallel can be drawn towards the arbitration forum.

[508] This possibility developed in light of European Directive 98/27, 1998 O.J. (L 116) on Injunctions for the Protection of Consumers' Interests, which requires all Member States to assign rights of action to "qualified entities" defined either as organizations (including consumer organizations) or independent public bodies, that would allow those entities to file a group litigation on behalf of a specially defined group of people who had been injured by the defendant's conduct. These actions do however not amount to class actions, since the European Directive explicitly noted that "*collective interests mean interests which do not include the cumulation of interests of individuals who have been harmed by an infringement*".

Article 17 of the Belgian Judicial Code provides, as a general rule, that a legal claim is not admissible if the claimant has no capacity and interest to lodge the claim. Article 18(1) of the Belgian Judicial Code adds hereto that a legal claim is admissible only if the claimant demonstrates a 'direct' interest. In turn, Belgian jurisprudence and doctrine added that the interest must be personal, meaning that it must concern the own interest of the (physical/moral) person.[509]

Nevertheless, Belgian courts and tribunals have created non-uniform and chaotic case-law on the admissibility of collective interest actions filed by associations. Examples of main court rulings are the Belgian Supreme Court and administrative courts.

The Belgian Supreme Court *("Cour de Cassation")* refused in the 1982 Eikendael case an association to lodge a legal claim that would represent merely a general interest or its company purpose as defined in its articles of association. In the Eikendael case it concerned an association for the protection of the environment. The Court requested the association to demonstrate a personal and direct (= own) interest. According to the Court, the own interest of an association refers to the interest that touches its existence or its material or moral goods, in particular its property, honor and good name.[510] The Belgian Supreme Court subsequently upheld its position from the Eikendael case in its ruling in the 1985 Neerpede case.[511] As a reaction hereto, the Belgian Legislator enacted the 12th January 1993 Act introducing special rights to lodge a claim for the protection of the environment.

Administrative courts have taken a different approach from the Belgian Supreme Court. For instance, the association involved in the Eikendael case also lodged a complaint in 1981 before the Belgian Counsel of state ("*Conseil d'état*"). Contrary to the ruling in the Eikendael case, the Belgian Counsel of state found the claim admissible. The Counsel of state ruled that the recognition of the existence of collective interests, that are different from the individual interests of the members of a group, leads to the recognition of the right of that group to defend collective interests before a judge through an organization. Therefore, associations that purport to protect the environment and that are driven by ideal collective interests rather than by their own interests, can act for the general interest.[512]

On 28th March 2003, the Belgian Counsel of state ruled that a federation of associations for nature and environmental associations (composed of non-profit

509 Cass. 19th November 1982, *Arr. Cass.*, 1982-83, concl. E. Krings, *Pas*. 1983, I, 338 and *RW* 1983-84, 2029, note J. Laenens.

510 Cass. 19 november 1982, *Arr. Cass.*, 1982-83, concl. E. Krings, *Pas*. 1983, I, 338 and *RW* 1983-84, 2029, note J. Laenens.

511 Cass. 25 oktober 1985, *RW* 1985-86, 2429, concl. E. Krings.

512 Raad van State, 11 september 1981, VZW Werkgroep voor milieubeheer Brasschaat, *RW* 1981-82, noot W. Lambrechts.

associations that each have legal personality), whose members have purposes in line with the union-purpose of the federation, cannot act for the interests that are specific to one of its members. The Belgian Counsel of state also found that the interests at stake were merely local interests that could not be represented by the over-coupling federation.[513]

On 18th February 1993, the Belgian Constitutional Court listed the conditions for a non-profit association to be able to defend a collective interest before a judge. The identified conditions were: 1) the company purpose of the association must be of a special nature and can be distinguished from the general interest; 2) the collective interest cannot be limited to the individual interests of its members; 3) the company purpose must be affected by the contested norm; 4) the activities of the association demonstrate that the company purpose is the real and actual purpose; and 5) the association must have a current and past enduring functioning.[514] These conditions were repeated in later rulings of the Belgian Constitutional Court.[515]

In 2001, the Belgian Constitutional Court ruled that the admissibility of a legal claim could be accepted following the proof of a sufficient link between the company purpose and the contested norm (to make it plausible that it has an interest in maintaining the norm).[516]

As demonstrated above, Belgian case law is much divided as to the possibility of an association to act for a collective interest. Divided case law may be the result from 'fear' of a high input of malicious claims and the idea that associations would take over the role of the public prosecutor.

Not only case law is divided in Belgium, the same can be said for a number of *ad hoc* legislations. Indeed, each of the following Acts sets out under which conditions associations can have access to a judge:

- The Act of 30th July 1981 on punishment of racist and xenophobe actions. Under this Act, associations that have; 1) since at least 5 years legal personality and 2) as their purpose to defend human rights or to 'fight' against discrimination, can request compliance with this Act.
- The Commercial Practice Act of 14th July 1991. Under this Act, associations of merchants can request certain orders, to seize behavior that is not compliant with the provisions of this Act.
- The Consumer Credit Act of 12th June 1991. This Act introduces the right of collective action to the benefit of consumer organizations.

513 Raad van State, 28 maart 2003, nr. 117 681, zaak A, 125.960/X-11 094.
514 Arbitragehof, 18 februari 1993, *Belgisch Staatsblad* van 3 maart 1993.
515 See, for instance; Arbitragehof, 4 maart 1993, *Belgisch Staatsblad* van 25 maart 1993.
516 Arbitragehof, 7 februari 2001, VZW Vlaamse Concentratie, nr. 10/2001, *Belgisch Staatsblad* van 1 maart 2001.

- The Act of 12th January 1993 on certain rights to claim for environmental organizations.

It is within the chaotic context as described above that since 3rd November 2011 a proposal was submitted to the Belgian Senate to amend the Belgian Judicial Code. Under this proposal (subject to ongoing discussions in a dedicated Commission), certain associations (and other legal entities) would be entitled to lodge legal claims for the protection of collective interests.[517]

In this proposal, the following reasons were identified that urge the Belgian Legislator to re-assess the existing atomistic and individualistic approach;

- Firstly, due to technical evolutions the "*one-to-one*" procedural model should be questioned. Indeed, nowadays more and more actions may affect a large(r) group of persons and – unlike half a century ago – their effects are not limited to one or only a few individuals. The effects, taken together, can be significant, while not reaching a threshold for each of the individuals who have a required interest, to lodge a legal claim;[518]
- Secondly, for certain groups of persons it would nowadays be difficult to have access to the judge. Persons at the edge of society risk therefore to become even more marginalized, while they require most access to the judge. For instance, people of lesser financial means often do not have the possibilities to lobby to request access to a judge;[519]
- Thirdly, associations fulfill a major role in democracy, as they represent a general or collective interest and increase the involvedness of the population in various evolutions in society (e.g. racism, environment, etc.)

The proposal therefore aims to introduce a uniform and clear system in which interest associations can lodge legal complaints to defend collective interests. A collective interest in the sense of the proposal is an interest that transcends the personal interests of members to the association, as the proposal sets out the following conditions under which associations could file collective interest actions:

1. The association must have legal personality;
2. At the moment the legal claim is lodged, the association must exist for at least a certain number of years. (1 or 3 years have been proposed).
3. The association can only lodge a legal claim when doing so is comprised in its company purpose. Hereby, it is provided that the company purpose is not the only criterion to determine whether an association can defend a certain interest

517 *See* the proposal submitted by Zakia Khattabi, Wetgevingsstuk nr. 5-1293/1 – Belgische Senaat, zitting 2011-2012, 3 november 2011 (subject to ongoing discussions in a dedicated Commission).

518 Lemmens, P., "Het optreden van verenigingen in rechte ter verdediging van collectieve belangen", *RW,* 1984, 2002-2026.

519 Moreau, T., "L'action d'intérêt collectif dans la lute contre la pauvreté", *JT,* 1994, 493.

in court, as its factual activities are necessary to identify the company purpose of the association;
4. The company purpose must be allowed (lawful);
5. The actual activities of the association must correspond with the company purpose and must concern the collective interest that the association aims to protect. The actual activity can be demonstrated by minutes, letters to members, activity reports, publications, etc.

2.2. The Netherlands

In the Netherlands, case law of the Dutch Supreme Court preceding the introduction of the collective interest action in the Dutch Civil Code (in 1994), allowed collective redress in a broad sense, including in relation to damages. However, at the time, not much use was made of this option.

Since 1994, a collective interest action article has been introduced in the Dutch Civil Code (Article 3:305a) under which an interest organization can, in certain circumstances, initiate a ''collective'' action for the benefit of the individuals whose interests it protects. However, under the wording of this Article suggests that a collective action for damages would not be allowed.

As opposed to Belgium, examples exist of an interest association representing the interests of its members in the arbitration forum. Indeed, regarding the use of arbitration in dealing with harm suffered by multiple entities, the Supreme Court ("*Hoge Raad*") of the Netherlands ruled on 1st July 1993 that an association which represents the interests of its members can participate in an arbitration procedure by invoking an arbitration clause that was previously entered into between its members and a third party, if there are certain circumstances that demonstrate a special relation between the association and its members that allow to assume that the arbitration clause should (also) be binding upon the association.[520]

This case concerned an association that grouped members in the agricultural sector who used gas to grow crops. A special relation existed between the association and its members, in a way that it was the association who conducted negotiations with the concerned gas supplier to set out the terms and conditions for gas supply to its members. It was these terms and conditions that contained an arbitration clause.

The Supreme Court clarified that an arbitration clause only binds the party to it and that its ruling does not amount to giving binding effects of the clause towards third parties. In addition, the Supreme Court found that the association itself should in this particular case not be considered a 'third party' towards its members, provided

[520] Hoge Raad, 1 July 1993, nr. 15016, LJN : ZC1028.

the special relationship with its members and the fact that it acted merely in the interest of its members.

This ruling may create a rather strange interface between the concept of being a ''party to the arbitration clause'' and the concept of being a "party to the arbitration". Indeed, in the present case the interest association was found to be a party to the arbitration clause, while its members were not themselves individually party to the arbitration proceedings. This makes that in this collective interest action, should the interest association have lost the matter, the counterpart would have been able to execute the ruling only against the interest association and not against the members of the association.

The latter explains that this ruling does not amount to a class action as such, as in the absence of any of the association`s individual members becoming parties to the arbitration proceedings, only the interest association who is found to be a party to the arbitration clause and who is at the same time also party to the arbitration proceedings, can be bound by the ruling.

3. Class actions

Neither Belgium nor the Netherlands provide for a class action mechanism as such. However, the Netherlands do provide for a closely related form of collective redress, while the Belgian Legislator has made attempts to pass a Belgian Class Action Bill.

3.1. Belgium

The Belgian Legislator had since 2009 been working on the introduction of a Belgian Act on Class Actions. The Belgian Class action Bill has never been passed through Parliament and it seems that the Belgian Legislator focuses on alternative forms to provide collective redress, such as collective interest actions filed by certain collective interest associations.

Nevertheless, it must be said that the Belgian Legislator came close to introducing class actions in Belgium. Indeed, in 2009, the Belgian Federal Minister of Justice and the Federal Minister of Consumer Affairs instructed a research team of the ULB University in Brussels to develop a Belgian Class Action Bill. This team produced a Draft that was mainly inspired by the rules on collective redress applicable in Quebec, Canada (since 1978) and the rules on collective redress applicable in The Netherlands (see below, since 2005).[5211]

[521] *See:* http://www.arbitration-adr.org/documents/?i=181 (Draft Bill) and http://www.arbitration-adr.org/documents/?i=179 (Explanatory Memorandum).

The structure that was proposed by this research team provided for an opt-out system, unless; 1) opt-in would be more appropriate and 2) the parties concerned are not resident in Belgium. The scope of the Bill was not limited to certain damages and the rules would have applied to all procedures implying mass injury, including businesses (such as loss resulting from breaching competition law or injury by industrial pollution, etc.)

The projected procedure was twofold:

- Firstly, the procedure can happen through an out-of-court agreement obtained by negotiations or through any ADR mechanism, with a post confirmation (homologation) by the relevant Court (of Brussels). The homologation renders the agreement binding on all group members. This procedure is very similar to the collective redress system in The Netherlands. Hereby, neither the acceptance of the agreement, nor the confirmation by court, would amount to an acceptance of liability.

- Secondly, the procedure can take place through a trial – with first a decision on the admissibility of the collective redress and subsequently a trial on the merits of the redress – with a permanent possibility to switch to an out-of-court agreement.

Under both forms, the application had to be made by a representative entity – being a group of victims or non-profit body acting on behalf of such victims – and would be published in a public register.

The judge would play a prominent role as, in case of an agreement, he may suggest amendments or refuse confirmation and/or may appoint a liquidator for the execution of his decision.

The Draft Class action Bill seemed to take the view that class treatment should only be possible in the litigation forum. Indeed, Article 6 *juncto* Article 8 of the proposed Draft Class action Bill suggested that where a valid arbitration clause/agreement exists, the party to such clause/agreement could still become or remain a member of class litigation, until and unless such party would have "*initiated*" its individual claim in the arbitration forum. Should a party have initiated its claim in the arbitration forum, such party could still become a group member if, prior to the end of the option term, it would submit a conclusion (in the arbitration forum) to waive its individual claim.

This intention of an implicit exclusion of class treatment from the Belgian arbitration forum was very unfortunate. It may well be that the creators of the Draft Belgian Class Action Bill took this view to make sure that certain companies would not use individual arbitration clauses as a tool to prevent class treatment. However, this

concern could have been addressed otherwise and did not require a plain exclusion of class treatment in the arbitration forum.

As said before, the introduction of class actions in Belgium seems to no longer be on the agenda of the Belgian legislator and it is hoped that should it be back on the agenda, sufficient attention will be given to the possibilities of arbitration.

3.2. The Netherlands

In 2005, the Netherlands incorporated the Dutch Act on collective redress of mass damages ("*Wet collectieve afwikkeling massaschade*" or "WCAM"), which adds to the aforementioned Article 3:305a of the Dutch Civil Code, by enabling the Court of Appeal in Amsterdam to declare an agreement on mass claims binding, be it an agreement obtained through litigation on the one hand and arbitration, mediation, conciliation, negotiation or any other ADR mechanism on the other.

One could say that the WCAM emphasizes on effects that can be given by a judge to an agreement[522] concerning the allocation and payment of damages. Indeed, under the WCAM, Article 909 (1) of book 7 of the Dutch Civil Code provides that: "*A definitive decision that is rendered following an agreement and that concerns the remuneration owed to someone who is entitled to obtain remuneration, is binding, unless…"* (emphasis added).

This formulation suggests that final decisions, including those rendered through an arbitration agreement, may play a role pursuant to the WCAM, but that role is limited to decisions with respect to the distribution of damages after the collective settlement agreement has been declared binding.

To date, the only certain influence of arbitration under the WCAM is that certain agreements (e.g. certain settlement agreements obtained during arbitral proceedings) may be given group-wide effects by the dedicated judge.[523] The consequences may however reach far, as an US class settlement may be converted into a Dutch Judgment, which in turn may be enforceable across the EU on the basis of EU Regulation 44/2001. This means that the Netherlands may serve as an '*entrance gate*' through which US class settlements may be converted into a judgment that could be executed throughout the EU.

In the execution of his/her task regarding the conversion of an agreement into a judgment, the dedicated judge will assess whether the organizations involved are

[522] Hereby, in the process of reaching an agreement, parties often exercise their right to access a judge in order to obtain an answer on essential legal questions: See Article 3:305a Of the Dutch Civil Code.

[523] *See*, for instance, the ruling of the Court of Amsterdam in the Shell case (29 May 2009) in which the Court rendered group-wide binding effects to a settlement agreement.

sufficiently representative and whether the agreement is reasonable. If the judge declares the agreement binding, every aggrieved party is given the possibility to opt-out and initiate an individual action.

The decision of the Dutch legislator to focus on a consensual basis for collective redress was inspired by the fact that the vast majority of US class actions tend to lead to a settlement.

4. Conclusion

Both the Netherlands and Belgium still do not have a class action system available in the ADR-forum, at least not in a strict sense.[524] Dispute (resolution) centers which deal with consumer disputes can therefore in principle only handle individual claims and existing ADR mechanisms to deal with financial mass disputes may even explicitly or implicitly exclude class arbitration in their house rules and regulations.[525]

Since 2005, the Netherlands has a mechanism under which the Amsterdam Court of Appeal may declare certain settlement agreements binding upon all members of a group. Such settlement may be the result of arbitration or arbitration may be part of the settlement agreement (e.g. settlement under which certain claims will be subject to arbitration).

Therefore, one could say that in theory arbitration can fulfill a significant role in dealing with mass claims in the Netherlands but that this doesn't seem to be the existing practice to date.

In Belgium, the Legislator has taken a very different legislative approach by emphasizing on the introduction of collective interest claims as the preferred alternative form of collective redress to class actions.

The authors opine that, regarding collective interest actions, there is no reason why parties would not be able to have their disputes dealt with in the arbitration forum.

Moreover, it appears that the role of arbitration has never sufficiently been assessed in relation to collective redress.

Last but not least, it must be understood that the beneficiaries of a collective interest action may not be parties to the arbitration agreement nor to the arbitral procedure

524 *See:* http://www.eerstekamer.nl/eu/behandeling/20110401/bijlage_bij_brief_inzake/f=/vio4juh1q2qb.pdf.

525 *See,* for instance, KIFID (http://www.kifid.nl/consumenten/wat-kan-kifid-voor-mij-doen). KIFID is a Dutch institute for financial complaints. Provided its complaint system, is very unlikely that KIFID would accept a complaint in the form of a class action.

and may therefore not be bound by *res judicata* effects. This is a hurdle that may be overcome through a class action construction.

General Conclusion

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In view of the new collective redress mechanisms that have recently been or may soon become enacted in various EU jurisdictions and the fact that EU Member states have a strong tradition in the use of ADR, the potential use of arbitration for the resolution of mass disputes has been examined and the advantages that could be offered by incorporating arbitration tools into a collective redress mechanism (e.g. class action) have been made explicit.

This book has identified class actions as an effective method of collective redress but has demonstrated that most EU jurisdictions tend to be reluctant to introduce US style class actions into their national jurisdictions.

Nevertheless, in light of the well-known evolutions in, and success of the US class arbitration practice, and provided that the consequences of a class action may reach far beyond the US territory, one would expect a swift introduction of a similar practice in the EU.

Nowadays, it must be noted that US style class actions still remain absent in the EU and have been diluted or altered into other forms of collective redress that are often very similar to class actions and may be described as EU style class actions.

Therefore, the ways in which class-arbitrations could be organized in Europe has been addressed against the backdrop of differing views in EU jurisdictions, the particular nature of representative actions, the EU context and the need for proper training standards for arbitrators that deal with mass disputes.

In light of due process and public policy concerns and the way these elements are filled in by various EU courts and tribunals, a tailored opt-in system seems to be the only way to determine in Europe who would belong to the class.

As suggested by the US class arbitration practice, class arbitration in Europe could only have a future if the major ADR centers in Europe would adopt tailored class arbitration rules. Indeed, the number of class arbitrations in the US has significantly increased since the adoption of class arbitration rules by AAA and JAMS and a similar evolution could be anticipated in Europe.

To this end, it is hoped that ADR providers and ADR-promoting entities will organize future key events[526] to inform and obtain required input of leading arbitration institutes, stakeholders and policy makers. Their efforts should allow the development of a working document or common policy that sufficiently addresses due process and public policy concerns regarding the organization of class arbitrations and the enforcement of subsequent class arbitral awards in Europe.

Besides this, and in line with a recent evolution in commercial cross-border mediation[527], internationally recognized and accepted training standards should be developed for arbitrators and mediators dealing with mass disputes. ADR centers are again well placed to join forces and to agree on these uniform standards of training for arbitrators and mediators, preferably in collaboration with courts that have experience with the case management of mass disputes.

The introduction of class arbitration may furthermore go hand in hand with the upcoming[528] evolutions in the field of online dispute resolution (ODR). Indeed, the online forum is best suitable to deal with a large number of entities simultaneously and could offer an opportunity to effectively opt-in or opt-out.

Not only should the arbitration community develop a common perspective on conditions for legitimacy of class arbitration and the EU Legislator take the advantages of arbitration into account when developing future collective redress policies, further amendments and examination should also be made regarding the existing national rules on collective redress.

For instance, the rules on collective redress in the Netherlands and the class action system that had been proposed for Belgium may have an internal paradox as they seem to be based on a positive attitude towards ADR (recourse taken to ADR in order to obtain a settlement) while simultaneously seem to nurse an underlying groundless aversion towards (class) arbitration.[529]

This aversion towards (class) arbitration may be based on misplaced perspectives regarding consumer protection. Indeed, an arbitration agreement has often in itself been found unfair to consumers. For instance, in the *Mostaza Claro case*[530], The

526 *See:* www.europeanclassactions.eu.

527 *See:* www.emtpj.eu.

528 *See:* the Commission's proposal for a Regulation on Online Dispute Resolution for Consumer Disputes (COM 2011 794/2). (More information available on: http://www.eesc.europa.eu/?i=portal.en.int-opinions.20992.)

529 This aversion may have been influenced by the US class action practice in which most class arbitrations tend to result in a settlement. We have discussed the criticism on class arbitration in the US and arrived at the conclusion that most of the criticism is probably ungrounded. The criticism that is grounded, for example with regard to the skills and expertise of arbiters to deal with mass disputes and complex litigation is to be overcome.

530 Case C-168/05 *Mostaza Claro v. Centro Móvil.*

European Court of Justice (ECJ) decided, within a consumer context, that when a national court is seized of an action for the annulment of an arbitration award, it must determine whether the arbitration agreement is void and it must annul the award if the arbitration agreement contains an unfair term. The ECJ specified that it is not relevant that the consumer raised the issue of unfairness only in the action for annulment and that he did not raise this point beforehand in the arbitration proceedings.

In these proceedings the ECJ applied Article 3(1) of Council Directive 93/13/EEC of April 5th, 1993 on unfair terms in consumer contracts, which provides that "*A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*"

The annex to this Directive contains an indicative list of unfair terms. This annex includes terms which have the object or effect of *"excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."* Subsequently, the Court ruled that "Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a national court seized of an action for annulment of an arbitration award must determine whether the arbitration agreement is void and annul that award where that agreement contains an unfair term, even though the consumer has not pleaded that invalidity in the course of the arbitration proceedings, but only in that of the action for annulment." *In this way, the Court concluded that the nature and importance of public interest underlying the protection which Directive 93/13/EEC confers on consumers, justify the national court being required to assess of its own motion whether a contractual term is unfair.*

This book demonstrates that, while the enforcement of class arbitral awards may pose much less problems, the introduction of class arbitration actions in Europe (European style class actions) faces many procedural hurdles.

Nevertheless, it seems that class actions and class arbitration remain the most effective forms of collective redress and should therefore be promoted.

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Acknowledgements

Among the many people to whom I am indebted for help in the preparation of this book, I wish to express particular thanks to Ewa Kurlanda and Laura Lozano for their unfailing help in the linguistic editing and shaping of the book into its present format.

I am also particularly grateful to Johan Billiet for his consistent guidance in making this book a possibility and to the Association for International Arbitration IVZW (co-editor) for its support in the marketing of this book.

Above all, I would like to express my gratitude to all the authors for their extensive research and contributions on class arbitration.

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